TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No. 208. 209.

HY-YU-TSE-MIL-KIN, APPELLANT,

vs.

PHILOMME SMITH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED FEBRUARY 5, 1903.

(13,224.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 596.

HY-YU-TSE-MIL-KIN, APPELLANT,

vs.

PHILOMME SMITH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

No. 2,595. October 12 1901.

Order Extending Time to Docket Cause.

Now, at this day, for good cause shown, it is ordered that the time within which the defendant is required to file the transcript of record in this cause, in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended thirty days.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 766. United States Circuit Court of Appeals for the Ninth Circuit. Philomme Smith vs. Hy-yu-tse-mil-kin. Order Extending Time to Docket. Filed Oct. 11, 1901. F. D. Monckton, Clerk.

In the Circuit Court of the United States for the District of Oregon.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.

Citation.

The United States of America, } ss.
Ninth Judicial Circuit.

To Philomme Smith, Greeting:

Whereas, Hy-yu-tse-mil-kin has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon in your favor, and has given the security required by law. You are therefore hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Oregon, in said District, this 12th day of September, A. D. 1901.

CHARLES B. BELLINGER,
Judge.

Due service of the above citation is hereby accepted at Pendleton, Oregon, this 13th day of September, 1901.

R. J. SLATER,
Attorney of Philomme Smith.

[Endorsed]: In the Circuit Court of the United States for the District of Oregon. Hy-yu-tse-mil-kin, Appellant, vs. Philomme Smith, Appellee. Citation. United States Circuit Court. Filed September 16, 1901. J. A. Sladen, Clerk. District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1899.

Be it remembered, that on the 13th day of November, 1899, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the District of Oregon:

Philomme Smith, of Adams, Umatilla county, State of Oregon, a full-blood Indian woman, a member of the Walla Walla band of Indians, and residing upon the Umatilla Indian Reservation, in said county and State, brings

this her bill of complaint against Hy-yu-tse-mil-kin, a full-blood Indian, residing upon said reservation, and therefore your orator complains and alleges:

I.

That on the 9th day of June, 1855, a treaty between the United States, on the one hand, and the Walla Walla, Cayuse and Umatilla Indian tribes and Indian bands in Washington and Oregon Territories, on the other, was concluded at Camp Stevens, in Walla Walla Valley, in Washington Territory, and duly signed by the representatives of said parties, and that said treaty was ratified by the United States Senate, on the 8th day of March, 1859, and proclaimed by the President of the United States on April 11th, 1859, wherein and whereby the said tribes of Indians, through their duly accredited representatives, ceded to the United States all their right, title, and claim to a large tract of country, situated in the territories of Oregon and Washington, and after a description of the said lands, so ceded, provided as follows: "That so much of the country described above as is contained in the following boundaries shall be set apart as a residence for said Indians, which tract, for the purpose contemplated, shall be held and regarded as an Indian reservation, to wit: Commencing in the middle of the channel of the Umatilla River, opposite the mouth of the Wild Horse Creek; thence up the middle of the channel of said creek to its source; thence southerly to a point in the Blue Mountains, known as Lee's Encampment; thence in a line to the head waters of Howtome Creek; thence west to the divide between Howtome and Birch Creeks; thence north-

erly along said divide to a point due west of the southwest corner of William C. McKay's land claim; thence east along his line to his southwest corner; thence to the place of beginning, all of which tract shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and superintendent. The said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the Government, other than is provided by this treaty, and until the expiration of the time specified that said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all citizens of the United States, the right to enter upon and occupy as settlers any lands not actually enclosed by said Indians."

II.

That said land, described above, is known and designated as the Umatilla Reservation, in Umatilla County, State of Oregon.

III.

That said treaty provided, in article 6, as follows:

"The President may from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for the Indians to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privileges, and locate thereon permanently. To a single person over twenty-one

years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family, over ten in number, twenty acres to each additional three members; and the President may provide for such rules and regulations as will secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvement thereon; and he may at any time at his discretion, after such person or family has made location on the land assigned, as permanent home, issue a patent to such person or family as such assigned land, conditioned that the tract shall not be aliened or leased for a longer term of two years, and shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restriction; provided, however, that no State legislation shall remove the restriction herein provided for without the consent of Congress."

IV.

That on the 3d day of March, 1885, the Congress of the United States passed an act entitled "An act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes," which said act was approved by the President of the United States March 3d, 1885, which said act provided that the President of the United States should cause lands to be allotted to the confederated bands of

Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Reservation, in the State of Oregon, as follows:

"Of agricultural lands to each head of the family, one hundred and sixty acres, to each single person over the age of eighteen years, eighty acres, to each orphan child under eighteen years of age, eighty acres, and to each child under eighteen years of age, not otherwise provided for, forty acres, and that all allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon selections made by the head of the family, and allotments to persons over eighteen years of age not classed as heads of families should be made upon the selection of such persons." Said act further provided for the appointment of three disinterested persons by the President, to go upon said reservation, and make said allotments in severalty, and to do all such acts as were further specified in said act to effectually carry out the purposes thereof.

V.

That in pursuance to said authority the President of the United States did appoint commissioners, who thereafter carried out the purposes of said act, and made allotments of land as therein provided, to the members of said confederated tribes of Indians of the bands upon said Umatilla Reservation, which said work was completed and said allotments made on or about the 1st day of April, 1891.

VI.

That at the time said allotments were made as aforesaid your orator, Philomme Smith, was the head of a

family, a full-blood Indian woman, a member of the Walla Walla band of Indians, and as such was located and residing with her family upon said reservation, and upon that particular tract of land hereinafter described.

VII.

That prior to the said allotment your orator, Philomme Smith, being a member of said Walla Walla band of Indians, and assuch located and residing upon said Umatilla Reservation, by and with the consent of the head men of said tribe, settled upon, took possession of, inclosed and made extensive improvements upon the following described tract of land, to wit: The southeast quarter of section twenty, township three north, range thirty-four east, of the Willamette meridian (S. E. ¼ S. 20, T. 3 N., R. 34 E., W. M.), containing one hundred and sixty acres of land, more or less, said land being situate upon and a part of said Umatilla Reservation, and at the time of said allotments your orator, Philomme Smith, was residing upon and had actual possession of said tract of land.

VIII.

That on or about the 1st day of April, 1891, the President, under the provisions of the said act of Congress, approved March 3d, 1885, appointed James P. Bushee and James B. Eddy special allotting agents to allot lands in severalty to the said Indians residing on the said Umatilla Reservation, and the said agents immediately thereafter went upon said reservation and entered upon the discharge of their duties as such allotting agents, at which time your orator, Philomme Smith, was in the actual possession of said tract of land as aforesaid, and while said

agents were upon said reservation allotting said lands your orator went to said agents and then and there selected said tract of land as her allotment, but said agents refused to allot said land to your orator, and wrongfully allotted the same to the defendant Hy-yu-tse-mil-kin.

IX.

That thereafter, to wit, on or about October ——, 1896, the said Hy-yu-tse-mil-kin wrongfully took possession of said tract of land and of all the improvements thereon, and wrongfully ousted your orator therefrom, and ever since said time has been, and now is, in the exclusive possession of said land, to the great damage of your orator in the sum of $2,500.

X.

That at the time said allotment was made by said allotting agents the said Hy-yu-tse-mil-kin had no improvements upon said land, and did not have possession of any part of the same, and your orator selected said land and notified said allotting agents of her said selection prior to the selection of said defendant; and the said allotting agents at the time they allotted said land to the defendant had actual knowledge and notice of all the facts herein stated, and at the time the defendant selected said land as his allotment and applied to said agents for the same defendant had actual knowledge and notice of all the facts herein stated, and of all the rights of your orator.

XI.

That at the time your orator settled upon said lands and selected the same as her allotment under said act of

Congress and inclosed and improved the same all of said acts were done and performed with the knowledge, consent, and approval of the then agent of the United States upon said Umatilla Reservation, and the said agent assigned and set apart said tract of land for your orator.

XII.

That no patent has been issued to the defendant for said land.

To the end, therefore, that your orator may have that relief she can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath of affirmaton, the benefit whereof is expressly waived by your orator, she now prays the Court for a decree declaring your orator to be the allottee upon the said tract of land, and that the allotment thereof to the defendant be canceled and annulled, and that the defendant, his servants and all persons holding under him as tenants, lessees, or otherwise, be forever enjoined from interfering with your orator's possession thereof, and that your orator have judgment against the defendant for damages in the sum of twenty-five hundred dollars ($2500), and the costs and disbursements of this suit, and that your orator may have such further or other relief in the premises as the nature of the circumstances of the case may require; and may it please your Honor to grant to your orator a writ of subpoena, to be directed to the said Hy-yu-tse-mil-kin, thereby commanding him at a certain time and under a certain penalty therein to be limited personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer

make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against him in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

R. J. SLATER,
Attorney for Orator.

State of Oregon, }
Umatilla County. } ss.

I, Philomme Smith, being first duly sworn, say I am the orator in the above-entitled suit, and the facts stated in the above bill of complaint are true, as I verily believe.

Her
PHILOMME X SMITH.
mark.

R. J. SLATER,
Witness to Mark.

Subscribed and sworn to before me this 11th day of November, 1899.

[Seal] J. T. HINKLE,
Notary Public for Oregon.

Filed November 13, 1899. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 13th day of November, 1899, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit:

Return of Civil Process.

United States of America,
District of Oregon. } ss.

I hereby certify that on the 2d day of December, 1899, at Pendleton, Umatilla County, in said District, I duly served the within subpoena ad respondendum upon the therein named Hy-yu-tse-mil-kin, and by delivering to him personally a true copy of said subpoena ad respondendum, duly certified to by me as United States marshal.

ZOETH HOUSER,
United States Marshal.
By S. L. Morse,
Deputy.

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

PHILOMME SMITH, Complainant.
vs.
HY-YU-TSE-MIL-KIN, Defendant.
No. 2.595.

Subpoena ad Respondendum.

The President of the United States of America, to Hy-yu-tse-mil-kin, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States,

at the courtroom thereof, in the city of Portland, in said District, on the first Monday of December next, which will be the 4th day of December, A. D. 1899, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein Phlomme Smith is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 13th day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

[Seal of the U S. Circuit Court, District of Oregon.]

J. A. SLADEN,
Clerk.

Memorandum pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

Returned and filed. December 6, 1899. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 30th day of December, 1899, there was duly filed in said court a demurrer to bill, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,
vs.
HY-YU-TSE-MIL-KIN.

Demurrer.

The demurrer of the above-named defendant Hy-yu-tse-mil-kin to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true, in such manner and form as the same herein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

1st. That it appeareth by plaintiff's own showing by the said bill that she is not entitled to the relief prayed by the bill against this defendant, or any relief, and that it appeareth by plaintiff's own showing by the said bill that your Honorable Court hath no jurisdiction over the subject matter of the said suit.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And he prays the judgment of this Honorable Court, whether he shall be compelled to make

any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

JOHN H. HALL,
United States Attorney, Solicitor and Counsel for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

JOHN H. HALL,
United States Attorney.

Filed December 30, 1899. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 6th day of March, 1900, the same being the 132d judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH, vs. HY-YU-TSE-MIL-KIN. } No. 2,595. March 6, 1900.

Order Setting Demurrer for Hearing.

Now, at this day, on motion of Mr. Edwin Mays, Assistant United States Attorney, it is ordered that the hearing of this cause upon the demurrer to the complaint herein be, and it is hereby, set for Monday, March 19, 1900.

And afterwards, to wit, on Monday, the 19th day of March, 1900, the same being the 143d judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,
vs.
HY-YU-TSE-MIL-KIN.

No. 2,595.
March 19, 1900.

Order Overruling Demurrer.

Now, at this day, comes the plaintiff herein by Mr. R. J. Slater, of counsel, and the defendant by Mr. John H. Hall, United States Attorney, and thereupon this cause comes on to be heard upon the demurrer to the bill of complaint herein, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged that said demurrer be, and the same is hereby, overruled.

And afterwards, to wit, on the 2d day of April, 1900, there was duly filed in said court an answer to bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,
Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Answer.

To the Honorable, the Judge of the Circuit Court of the United States for the District of Oregon:

Comes now the defendant above named, and for answer to plaintiff's bill of complaint filed herein alleges:

That defendant had no knowledge or information sufficient to form a belief as to whether or not Philomme Smith, the plaintiff herein, is a full-blooded Indian woman, or a member of the Walla Walla band of Indians, and therefore denies the same.

Admits the execution of the treaty between the United States on the one hand, and the Walla Walla Cayuse and Umatilla Indian tribes on the other, as pleaded in paragraph 1 of plaintiff's complaint.

Admits that the land described in said paragraph 1 is known and designated as the Umatilla Indian Reservation, and situated in Umatilla County, State of Oregon.

Admits the said treaty in section 6, article 6 thereof, as set forth in paragraph 3 of plaintiff's complaint.

Admits the provision of the act of March 3d, 1885, of

the Congress of the United States, as set out in paragraph 4.

Admits appointment by the President of the United States of commissioners for the allotment of land upon said Indian Reservation, to said tribes of Indians, and that said work was completed and allotments made on or about the first day of April, 1891.

Denies that at the time said allotments were made, or at any other time, or at all, Philomme Smith was the head of a family.

Denies, upon information and belief, that she was a full-blooded Indian woman, or a member of the Walla Walla band of Indians, or as such, or at all, was located or residing with her family upon said reservation, or upon any particular tract of land thereon.

Denies, upon information and belief, prior to the said allotment that said Philomme Smith was a member of said Walla Walla band of Indians, or as such, or at all, was located or residing upon said Umatilla Reservation, either with or without the consent of the head men of said tribe.

Denies that plaintiff ever took possession of or enclosed or made extensive or any improvements upon the southeast quarter of section 20, township 3 north of range 34, east of the Willamette meridian, except as hereinafter stated.

Admits that said land was a part of said Umatilla Reservation, but denies that at the time of said allotment, or any other time, said Philomme Smith was residing upon or had actual or any possession of said tract of land, or any portion thereof, except as hereinafter stated.

Admits that on or about the 1st day of April, 1891, the President of the United States, under the provisions of said act of Congress approved March 3, 1885, appointed James P. Bushee and James B. Eddy special allotting agents to allot lands in severalty to the said Indians residing on the said Umatilla Indian Reservation, and that said agents immediately thereafter went upon said reservation and entered upon the discharge of their duties as such; but,

Denies that at said time, or any other time, plaintiff was in actual or any possession of said tract of land or any portion thereof, and as to whether or not, while said agents were upon said reservation allotting said lands, or at any other time, or at all, plaintiff went to said agents, and then and there selected said lands for her allotment, as to whether or not said agents, or either of them, refused to allot said lands to plaintiff, this defendant has no knowledge or information to form belief, and therefore denies same.

Denies that said allotting agents wrongfully allotted said southeast quarter of said section 20, township and range as aforesaid, to this defendant.

Denies that on or about the —— day of October, 1896, or at any other time, the defendant wrongfully took possession of said tract of land and improvements thereon, or wrongfully ousted plaintiff therefrom, but avers that defendant, on or about said day, rightfully took possession of said tract of land and such improvements there were thereon, and ever since said time has been, and now is, in exclusive possession of said land; but denies that

plaintiff is damaged thereby in the sum of $2,500, or any other sum whatever.

Admits that at the time said allotment was made by said agents defendant had no improvements upon said land, and did not have possession thereof, but denies upon information and belief that plaintiff selected said land, and notified said allotting agents of her selection prior to the selection by this defendant, or that the said allotting agents, or either of them, at the time they allotted said land to defendant had actual notice or knowledge of all or any of the facts set forth in plaintiff's complaint at the time defendant selected said land as his allotment, but applied to said agents for the same.

Denies that defendant had actual or any knowledge of all or any of the facts stated in plaintiff's complaint, or of all or any of the alleged rights of plaintiff.

Denies, upon information and belief, that at the time plaintiff alleges she settled upon said land and selected the same as her allotment, and enclosed and improved same, all or any of the said alleged facts were done or performed with the knowledge or consent of the then agents of the United States upon the said Umatilla Reservation, or that said agents assigned or set apart said land for plaintiff.

Admits that defendant has not yet received a patent from the Government of the United States for said land, and defendant, for further and separate answer or defense to plaintiff's bill of complaint filed herein, alleges:

That during the year of 1891, and at the time that said allotments in severalty were being made by said allotting agents, that Philomme Smith, the plaintiff herein,

was then residing upon the northwest quarter of the northeast quarter of section 29, township 3 north, range 34 east, of the Willamette meridian, and being upon the Umatilla Reservation.

That plaintiff was not residing upon the southeast quarter of section 20, township and range aforesaid, and that plaintiff had no improvements thereon save and except a small log barn and a well.

That at the time of said allotment, by a ruling of the Secretary of the Interior, plaintiff was not entitled to an allotment upon said Indian Reservation; and that at said time defendant herein being a full-blooded Indian, and residing upon said reservation, duly made a selection of the said southeast quarter of said section 20, and the same was duly allotted to him by the allotting agents.

That thereafter defendant paid to the said Philomme Smith the sum of twenty dollars, through the then agent of the Umatilla Indian Reservation, which sum was then and there received by plaintiff in full compensation for all improvements she then had upon said southeast quarter of section 20.

That defendant peaceably and with the consent of plaintiff took possession of said tract of land, and ever since that time has been, and now is, in possession of the same.

And plaintiff further alleges that at the time said allotments were being made that the said Philomme Smith was not the head of a family, and that she was married to a white man of the name of ——— Smith, and that the same ——— Smith being the head of said family, and

not being an Indian, and not belonging to said tribe was not entitled to a selection of land for an allotment.

That thereafter, on or about the —— day of April, 1897; the Department of the Interior of the United States reversed its former ruling, and decided that the said Philomme Smith, the plaintiff herein, was entitled to an allotment of land upon said Umatilla Reservation, and in pursuance thereof directed Mr. George W. Harper, the then Indian agent in charge of said Umatilla Reservation, to make an allotment of land to the said Philomme Smith.

That in pursuance of said direction said Indian agent requested said Philomme Smith to make selection land to be allotted to her on said reservation.

That in pursuance thereof said Philomme Smith did make selection of lots 13 and 14 in section 36, township 3 north, range 33 east, containing seventy acres, and other lands which defendant is not able to describe.

That said lands were duly allotted to her by the said Indian agent in pursuance of his authority aforesaid, and that thereafter said Philomme Smith took possession of said lands so allotted to her, and has ever since said time exercised ownership over the same, and has rented out said lands, particularly the seventy acres hereinbefore described for the years 1898, 1899, 1900 and 1901, at an annual rental of one dollar and fifty cents per acre, which said rental said plaintiff collects and enjoys.

That said Philomme Smith has not surrendered or offered to surrender, cancel, or give up said allotment so made to her by said agent, but continues to hold, use, and occupy same.

Wherefore, defendant having fully answered each and every allegation in plaintiff's complaint, respectfully prays your Honors that he be dismissed hence with his costs and disbursements, and for such further equitable relief as to your Honors may seem meet and just.

HY-YU-TSE-MIL-KIN,
Defendant.

By JOHN H. HALL,
Appearing for him under the direction of the Attorney General of the United States.

Filed April 2, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 13th day of April, 1900, there was duly filed in said court a replication, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff.

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Replication.

To the Honorable, the Judge of the Circuit Court of the United States for the District of Oregon.

Replication of complaint in above cause to the answer of Hy-yu-tse-mil-kin, defendant.

This replicant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto saith that she will aver and prove her said bill to be true and sufficient, and that the said answer is untrue and insufficient.

Wherefore she prays relief as in said bill set forth.

Her
PHILOMME X SMITH.
mark.

United States of America,
District of Oregon. } ss.

I, Philomme Smith, complainant in above cause, having read the foregoing replication to answer of defendant herein, and being first duly sworn, do say that the matters and things in said replication contained are true.

Her
PHILOMME X SMITH.
mark.

Subscribed and sworn to before me this 9th day of April, A. D. 1900.

[Seal] J. T. HINKLE,
Notary Public for Oregon.

Filed April 13, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 1st day of May, 1900, the same being the 19th judicial day of the regular April term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

No. 2,595.
May 1, 1900.

Order Appointing Charles H. Carter Special Examiner.

Now at this day, on motion of Mr. John H. Hall, United States Attorney, of counsel for the defendant herein, it is ordered that Charles H. Carter, of Pendleton, in the county of Umatilla, and in the State and District of Oregon, be, and he is hereby, appointed a special examiner of this court for the purpose of taking such testimony in this cause as shall be produced before him by the parties to this suit, said testimony to be taken at such times and at such places as said special examiner may decide, due notice thereof being first given to the parties hereto or to their counsel; and

It is further ordered that said testimony be reduced to writing, and that upon its conclusion said special examiner shall send the same, together with his findings of fact thereon, to the clerk of this court.

CHARLES B. BELLINGER,
Judge.

Filed May 1, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Monday, the 12th day of November, 1900, the same being the 37th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

No. 2,595.
November 12, 1900

Order Appointing J. A. Sladen Special Examiner.

Now, at this day, comes the plaintiff, by Mr. John H. Hall, United States Attorney, and moves the Court for an order appointing a special examiner to take the testimony in this cause at Portland, Oregon. On consideration whereof, it is ordered that J. A. Sladen, clerk of the United States Circuit Court for the District of Oregon, be, and he is hereby, appointed a special examiner of this court, to take and reduce to writing and transmit to the Court the testimony of J. B. Eddy, a witness on the part of the defendant in this cause, said testimony to be taken at such time and place in the city of Portland, in this State and District, as said special examiner shall appoint,

due notice thereof having been given to the parties hereto.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.
No. 2,595.
November 12, 1900

Order Referring Cause Back to Charles H. Carter, Special Examiner.

Now, at this day, on motion of Mr. John H. Hall, United States Attorney, of counsel for the defendant herein, it is ordered that this cause be, and the same is hereby, referred back to Mr. Charles H. Carter, heretofore appointed a special examiner in this cause at Pendleton, Oregon, for the purpose of taking such further testimony in this cause as shall be produced before him by the parties to this suit, said testimony to be taken at such times and places as said special examiner may decide, due notice thereof being first given to the parties hereto; and

It is further ordered that said testimony be reduced to

writing, and upon its conclusion said special examiner shall send the same to the clerk of this Court.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH
vs.
HY-YU-TSE-MIL-KIN.

No. 2,595.
November 12, 1900.

Order Appointing Commissioner to Take Depositions.

Now, at this day, comes the defendant, by Mr. John H. Hall, United States Attorney, and said defendant moves the Court for an order that a dedimus potestatem issue out of this court, directed to some qualified person at Spokane, in the State of Washington, authorizing and empowering him, as a Commissioner of this court, to take and transmit to this Court the testimony of G. W. Harper, a witness on the part of said defendant, to be used on the trial of this cause, and it appearing necessary, to prevent a failure of justice, that the testimony of said witnesses should be taken on commission issued out of this court:

It is ordered that the clerk of this court issue a commission to James W. Marshall, residing at Spokane, aforesaid, authorizing and empowering him as a Commissioner of this court to take and transmit to this Court the testi-

mony of the above-named witness, in answer to interrogatories, direct and cross, to be prepared by the parties, and submitted to the clerk in case they cannot agree thereto.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 20th day of November, 1900, there was duly filed in said court a stipulation for commission to J. W. Marshall, to take depositions in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Stipulation to Take Deposition of G. W. Harper.

It is hereby stipulated, by and between the parties hereto, that the deposition of G. W. Harper, a witness for plaintiff, residing at Spokane, State of Washington, may be taken by interrogatories hereto attached and made a part of this stipulation, said deposition to be taken by Jas. W. Marshall a deputy United States clerk for the State of Washington, residing at Spokane in said State,

at his office at Spokane, in said State of Washington, on the 23d day of November, 1900, at the hour of two o'clock P. M.; or if for any reason the said James W. Marshall cannot take said deposition, then the same may be taken by any other notary public for the State of Washington at the same time and place.

That before testifying the said G. W. Harper shall be sworn by the officer taking the same, to tell the truth, the whole truth, and nothing but the truth; and the said officer shall cause the interrogatories and cross-interrogatories hereto attached, and the answers thereto, to be typewritten and then signed by the said G. W. Harper; and when the evidence is thus reduced to typewriting, the said officer shall certify that the same was taken as herein provided, and all other forms and requirements are hereby waived.

And the officer taking the same shall seal the depositions thus taken by him, and mail them to C. H. Carter, at Pendleton, Oregon, and the same shall be used by either party as evidence in this cause.

R. J. SLATER,
Attorney for Plaintiff.
JOHN H. HALL,
Attorney for Defendant.

Filed November 20, 1900. J. A. Sladen, Clerk.

And afterwards, to wit, on the 10th day of September, 1900, there was duly filed in said court the findings of Charles H. Carter, Special Examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

Report of Special Examiner Carter.

To the Honorable CHARLES B. BELLINGER, Judge of the Circuit Court of the United States for the District of Oregon:

The undersigned, Chas. H. Carter, of Pendleton, Oregon, who was on May 1st, 1900, duly appointed by your Honor special examiner in the above-entitled cause, to take testimony therein and return the same, together with his findings of fact thereon, to the said Court, respectfully reports:

That by agreement between both parties to the above-entitled suit, by their attorneys and solicitors, he, as special examiner, fixed the time for the taking of testimony herein at 10 o'clock in the forenoon on July 31, 1900, at the courthouse of Umatilla county, Oregon, in Pendleton, in said county, at which time and place he attended, and the plaintiff also attended in person, and by Robert J. Slater, her attorney and solicitor, and defendant also attended in person and by Mr. John H. Hall, United States District Attorney, his solicitor and attor-

ney; and at that time and place the testimony of the following witnesses on behalf of plaintiff was taken, to wit: W. A. Smith, Philomme Smith (the plaintiff), and Edward Brisbo, and the testimony of the following witnesses on behalf of the defendant was taken, to wit: Louis Chalifoe, Albert Minthorn, the defendant Hy-yu-tse-mil-kin, and Charles Wilkins, the Indian agent, and the services of Joseph Craig, an Indian as interpreter, were required by the defendant; the testimony of the said witnesses, together with all exhibits introduced by the parties to this suit, is herewith returned to the clerk of the above-entitled Circuit Court, said testimony having been taken by Mr. J. S. Beckwith, as stenographer, who was employed by mutual agreement between the parties hereto for the occasion and for that purpose, and the testimony of the said witnesses was taken down by the said stenographer in shorthand, and afterwards by him reduced to typewriting; the signing of their testimony by the witnesses, respectively, was by the said parties through their attorneys aforesaid, before me in open court, expressly waived in this cause.

The said special examiner reports to the Court the following as his findings of facts in this cause:

I.

That plaintiff, Philomme Smith, is a full-blooded Indian woman, and at all the times in the complaint mentioned was, and is now, a member of the Walla Walla band or tribe of Indians, and resides upon the Umatilla Indian Reservation, in the State of Oregon.

II.

The defendant, Hy-yu-tse-mil-kin, is a full-blooded Indian, residing upon said Umatilla Indian Reservation, in the State of Oregon.

III.

That a treaty was executed between the United States, on the one hand, and the Walla Walla, Cayuse and Umatilla Indian tribes and Indian bands, on the other, as stated in paragraph I of plaintiff's complaint.

IV.

The land described in said paragraph I of plaintiff's complaint is situated on the Umatilla Indian Reservation, in Umatilla County, State of Oregon.

V.

That in article 6 of the said treaty it was provided as follows:

"The President may from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now, or hereafter, be set apart as a permanent home for the Indians, to be surveyed into lots and assigned to such Indians of the confederated bands, as may wish to enjoy the privileges, and locate thereon permanently: To a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family, over ten in number, twenty acres to each additional three members;

and the President may provide for such rules and regulations as will secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvement thereon; and he may at any time at his discretion, after such person or family has made location on the land assigned, as a permanent home, issue a patent to such person or family as such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restriction; provided, however, that no State legislation shall remove the restriction herein provided for without the consent of Congress."

VI.

On March 3, 1885, the Congress of the United States passed an act, entitled "An act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Indian Reservation, in the State of Oregon, and granting patents therefor, and for other purposes," which was approved by the President of the United States on March 3, 1885, which act provides that said President should cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing on the Umatilla Indian Reservation aforesaid, and which contains the provision set forth in paragraph IV of plaintiff's complaint in this cause.

VII.

In pursuance of the authority granted by that act, the President of the United States appointed commissioners

for the allotment of lands on said Umatilla Indian Reservation to those entitled to it, which commissioners thereafter carried out the purposes of said act, and made allotments of lands as provided therein to the members of said confederated tribes of Indians of the bands of Indians upon said Umatilla Indian Reservation, which work was completed and allotments made on or about April 1st, 1891.

VIII.

At the time the above mentioned allotment was made, plaintiff, Philomme Smith, was the wife of W. A. Smith, who was really the head of his family, which consisted of himself, his wife, and their eight children; said W. A. Smith is a white person, and has been plaintiff's husband since January 16, 1861, whilst plaintiff is an Indian woman belonging to the Walla Walla tribe of Indians from her birth; the Honorable Secretary of the Interior in Washington, and the Honorable Assistant Attorney General, seem to recognize plaintiff as the head of the family, in the sense mentioned in the above-named act of Congress of March 3, 1885, and as such she is entitled to allotment on the Umatilla Indian Reservation if she is otherwise competent to have such allotment (see Plaintiff's Exhibit "A" herewith); at the time the said allotments were made the said plaintiff, Philomme Smith, was located and residing with her family upon the Umatilla Indian Reservation above mentioned, upon a large tract of land, including the particular tract of land in controversy in this cause, to wit: The southeast quarter of section 20, in township 3 north and range 34 east of the Willamette meridian, containing one hundred and sixty acres of land.

and plaintiff, with her family, at that time were living about twenty steps from the boundary line of the particular one hundred and sixty acres last described inside of another field which was inclosed with said one hundred and sixty acres in one body by having a furrow plowed around the same, marking it off from the other adjacent lands; and she and her family were then in possession thereof.

IX.

That prior to the allotment of said lands by said commissioners on the Umatilla Indian Reservation, and after the allotting lists from which the allotments were made by said commissioners were made up, plaintiff, Philomme Smith, with the consent of Homily, then chief of the Walla Walla Indians, and Show-a-way, chief of the Cayuse Indians, with her family settled upon the tract of land as above stated, took possession of it and enclosed it in the manner above mentioned, to wit, by plowing certain furrows around it, thus dividing it by those furrows plowed from the adjacent lands on said reservation, which plowing was done in April, 1888, or immediately thereafter; at that time there were no improvements on the land; the whole body of land around which this furrow was plowed aggregated about five hundred and sixty acres, which plaintiff, through her husband, as her agent, in 1888, when she first moved upon said reservation, selected as lands for herself and her family; that thereafter and prior to the time when allotment was made the plaintiff, with the assistance of her husband, made valuable improvements upon and around said southeast quarter of section 20, township 3 north, range 34 east of the Wil-

lamette meridian, by building upon this particular one hundred and sixty acres of land in controversy in this suit a small cabin thereon for a granary, a barn, and by having a well dug on it, and later on and prior to said allotment by having another barn built on it; also a mile and a quarter of wire fence enclosing the whole tract; the total value of the improvements upon this particular one hundred and sixty acres in controversy, so built by plaintiff prior to allotment, was about $500.00 to $575.00 at that time; but up to the time when the allotments of lands were made by the commissioners as aforesaid plaintiff and her family had only used the particular one hundred and sixty acres in controversy for the purpose of pasturing stock thereon; the southeast quarter of section 20, township 3 north, range 34 east of the Willamette meridian, above mentioned, is a part of the Umatilla Reservation, in the State of Oregon, and plaintiff was residing in a house about twenty steps from the edge thereof from the time she moved upon said reservation, to wit, in the month of April, 1888, until long after the allotments were made by the commissioners aforesaid, to wit, until 1897; and plaintiff and her family had possession of said place, with the improvements made thereon as above stated, from some time during the year 1888 until about the year 1897 or the fall of the year 1896, she and her family living during that time in the house about twenty steps from the boundary line of said particular one hundred and sixty acres; plaintiff did not leave it or leave possession of it until about 1897, when plaintiff and her family did leave it because they were ordered to do so by the then Indian agent.

X.

About April 1st, 1891, under provisions of the aforesaid act of Congress approved March 3d, 1895, the President of the United States appointed James P. Bushee and James B. Eddy special allotting agents, to allot the land in severalty to the Indians of the Umatilla Reservation, and those gentlemen immediately thereafter went on that reservation and entered upon the discharge of their duties, and at that time plaintiff and her family resided in the house above mentioned, about twenty steps from the edge of the one hundred and sixty acres of land in controversy in this cause, and she and her family having possession thereof, having used the same up to that time only for the purpose of pasturing stock thereon, and having made the improvements thereon as aforesaid prior to and up to that time; and whilst the said Bushee and Eddy, special allotting agents, were upon the Umatilla Indian Reservation, allotting the lands thereof, plaintiff and her husband, who was acting as her agent and representative, went to the allotting agents and asked to have the particular tract of one hundred and sixty acres in controversy in this cause allotted to her, the plaintiff, and selected that tract as her allotment; but those agents refused to allot that land to plaintiff because her name was not upon their allotment lists at all; and the said allotting agents did then allot the said one hundred and sixty acres, to wit, the southeast quarter of section 20, in township 3 north, range 34 east of the Willamette meridian, to the defendant, Hy-yu-tse-mil-kin, who was and is an Indian, properly entitled to an allotment of one hundred and sixty acres of land upon said reservation.

XI.

The defendant, Hy-yu-tse-mil-kin, in the month of October, 1896, took possession of the said southeast quarter of section 20, in controversy here, and about that time plaintiff, by order of the Indian agent on that reservation, relinquished her possession of those lands.

XII.

When the allotment was made the defendant had no improvements whatever upon any part of the lands in controversy, and had no possession thereof; before those lands were allotted to defendant, and whilst the allotting agents were engaged in allotting the lands as above stated, plaintiff asked to be allotted upon the particular one hundred and sixty acres in controversy in this cause by those allotting agents, but they declined to do so, because her name was not upon their allotting list.

XIII.

At the time when the plaintiff and her family settled upon the tract of five hundred and sixty acres which enclose the tract in controversy in this cause, to wit, in 1888, and when the same was marked off by having a furrow plowed around it as aforesaid, these acts of plaintiff and her family were done with the knowledge and consent of ——— Coffee, who was at that time acting as Indian agent upon the Umatilla Reservation aforesaid.

XIV.

That no patent had ever been issued for said lands when this cause was commenced.

XV.

That in the year A. D. 1900, at the time that the allot-

ments in severalty of the lands were made by the allotting agents aforesaid, plaintiff did not reside upon the one hundred and sixty acres in controversy, but did reside upon the lands adjacent thereto, and about twenty steps distant therefrom, but plaintiff and her family held possession at that time, and for some time theretofore and thereafter, as shown in the above findings of facts; but plaintiff has never actually resided upon that particular quarter section of land; that defendant has never paid plaintiff any money at all, in any manner, for any improvements which she then or ever had upon any part of the lands in controversy in this suit; that defendant went into possession of the land when plaintiff moved out of the possession thereof, in the fall of 1896 or the early part of 1897, and plaintiff so left possession thereof by reason of the orders to her given by the then Indian agent, G. W. Harper; and since she so went out of possession of said lands she has never at any time been in possession of any part thereof.

XVI.

That when the allotment were made in 1891 as aforesaid of said lands plaintiff was married to the above named W. A. Smith, who is a white man, and has never belonged to any tribe of Indians, and is not entitled to any selection of land for any allotment upon the Umatilla Reservation; and during all the time while she has been on the reservation her said husband, W. A. Smith, has acted as agent for her; as to whether plaintiff is the head of the family, or the said W. A. Smith is the head of the family, the special examiner does not know; but

XVII.

In April, 1897, the Department of the Interior of the United States decided that plaintiff was entitled to an allotment of land upon the Umatilla Indian Reservation aforesaid; and directed G. W. Harper, the then Indian agent in charge of that reservation, to make an allotment to plaintiff, pursuant to that direction the said G. W. Harper, as Indian agent, called upon the plaintiff to make a selection of lands for her allotment, and plaintiff's husband, W. A. Smith, claiming to act for plaintiff, consented to accept as allotment for her lots 13 and 14, in section 36, in township 3 north and range 33 east of the Willamette meridian, and lot 3 of section 5, in township 2 north, and the southwest quarter of the northwest quarter of section 33, in township 3 north and range 34 east of the Willamette meridian, containing one hundred and forty-six and twenty hundredths acres in all, as her allotment, recognizing her in so doing as the head of a family, and a part of this land, to wit, so much thereof as is contained in section 36, in township 3 north, range 33 east of the Willamette meridian, she leased three or four years ago to a tenant, and since then she has, in the latter part of the year 1899 or the first part of the year 1900, again leased it to one Snyder, and plaintiff has accepted as the rental of said lands from said Snyder certain rents therefor, by the last lease which she made to the said Snyder he is to pay her a rental of three dollars per acre, and by the first lease the rental she received was two and one-half dollars per acre; that this lease only covers seventy acres; this selection of land was made for the plaintiff by

her husband, and plaintiff has actually received herself some of the rents therefor.

XVIII.

That plaintiff has not in any manner surrendered, or offered to surrender, or cancel, or give up any part of the allotments so made to her by the said agent, George W. Harper, but continues to receive the rents therefor.

XIX.

Plaintiff left the one hundred and sixty acres in controversy in this suit, and the possession thereof, and all the improvements thereon, because the Indian agent, George W. Harper, told her she had no right to stay there and that she had to leave; she asked of the allotting agents to have the land in question allotted to her, but they refused to do so because her name was not upon the allotting list; she herself selected for herself the one hundred and sixty acres of land in controversy in this suit, out of the whole tract of land which had been marked out by her husband; she never raised any crop on the land, nor rented it to anybody, and only used it for pasturing stock.

Respectfully submitted,

CHAS. H. CARTER,
Special Examiner.

Filed September 10, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 1st day of March, 1901, there was duly filed in said court supplemental findings of Charles H. Carter, special examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Supplemental Report of Special Commissioner.

To the Honorable CHARLES B. BELLINGER, Judge of the above-entitled Court.

This cause was referred back to the undersigned, Charles H. Carter, special examiner, by an order made by your Honor some time after September 10, 1900, by request of both parties, in order that each side might take some further testimony; accordingly, the deposition of J. B. Eddy, taken before Special Commissioner J. A. Sladen, and the deposition of G. W. Harper, taken before United States Commissioner J. W. Marshall at Spokane, Washington, have been submitted to the special examiner, and also, on January 19, 1901, at 1:30 o'clock P. M., pursuant to due notice given to each of the parties to this suit, through their counsel respectively, the testimony of Susanne Gagnon, and the additional testimony of Mrs. Philomme Smith, the plaintiff, F. A. Smith, her husband, and Ed. Brisbow, all witnesses on behalf of plaintiff, was taken before the undersigned; on the 18th of January, 1901, a request was made of the undersigned, as commissioner, by Hon. John H. Hall, district attorney, representing defendant, to postpone the taking of the deposi-

tions on the following day, or, if that should not be done, then that the cause, after the deposition was taken, might be adjourned for one week, in order to give him as counsel for defendant, an opportunity to cross-examine the witnesses, if he wished to; accordingly, on January 19, 1901, after the testimony of the witnesses was taken before the special examiner, as above stated, the cause was adjourned until 10 o'clock in the forenoon of the 26th day of January, 1901, at the office of the said examiner, in the Pendleton Savings Bank Building, in Pendleton, Oregon, at which time and place the commissioner attended but no person appeared; and thereupon the taking of depositions in the cause was declared closed.

From all the evidence in the case your special examiner finds no cause to change any of the findings of fact which he heretofore submitted to the Court, and which was filed with the clerk of this Court on September 10, 1900, except in the following particulars:

I.

The ninth finding of facts heretofore made by the Commissioner is accurate, except that, in addition to the furrows plowed around the property, mentioned therein, there was also a fence, composed of posts and two wires, thereon, enclosing the property, which constitutes an additional improvement thereon, and this raises the total value of the improvements on the property about $200, so that those improvements at the time mentioned in that finding would be from $700 to $775.

II.

Finding of fact thirteen, on page 7: This finding should be so changed as to show that in addition to hav-

ing a furrow plowed around it, the five hundred and sixty acres of land also was enclosed with a wire fence, as above described.

With the above exceptions, the former report of your special examiner correctly shows all the facts which, in his judgment, are established by the evidence herein.

Respectfully submitted, this 26th day of February, 1901.

CHAS. H. CARTER,
Special Examiner.

Filed March 1, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 3d day of May, 1901, there was duly filed in said court exceptions to findings of special examiner, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,
Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Exceptions to Findings of Special Examiner.

To the Honorable Judges of the Above-entitled Court:

Comes now the defendant above named, by John H. Hall, United States Attorney, appearing in his behalf

and on behalf of the United States, and excepts to the findings of fact heretofore made by Chas. H. Carter, as special examiner, in the above-entitled suit made and filed by him herein as follows, to wit:

Defendant excepts to the first finding of fact that plaintiff is a full-blooded Indian woman, or now is a member of the Walla Walla band or tribe of Indians, for the reason that said finding of fact is not supported by the evidence produced before said special examiner.

Second. Defendant excepts to all that portion of the ninth finding of fact wherein the examiner finds that the property in controversy at the time of the allotment was enclosed with post and wire fences, and that a barn was built by plaintiff thereon prior to allotment, and the finding that the improvements thereon were of the value of from $700.00 to $775.00, for the reason that said portions of said findings are not supported by the evidence produced before the said examiner.

Third. Defendant excepts to that portion of the tenth finding of fact wherein the special examiner finds that plaintiff at the time of allotment had possession of the land in controversy, and wherein he finds that plaintiff requested the allotting commissioner to allot said land to her.

Fourth. Defendant excepts to the twelfth finding of fact wherein the examiner finds that while before the lands in controversy were allotted to this defendant, and while the allotting agents were engaged in allotting the lands on said reservation plaintiff asked to be allotted upon the one hundred and sixty acres of land in contro-

versy, for the reason that said finding is not supported by the evidence produced by the special examiner.

Fifth. Defendant excepts to the thirteenth finding of fact wherein the examiner finds that the five hundred and sixty acres of land was enclosed with a wire fence, in addition to having a furrow plowed around it, for the reason that said finding is not supported by the evidence produced before the special examiner.

Sixth. Defendant excepts to that portion of the fifteenth finding of fact wherein it is found that defendant never paid plaintiff any money at all in any manner for any improvements which plaintiff had upon any part of the lands in controversy, for the reason that said portion of said findings is not supported by the evidence produced before the special examiner.

JOHN H. HALL,
United States Attorney.

Filed May 3, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Wednesday, the 10th day of July, 1901, the same being the 79th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

Decree.

Now, at this time, this cause coming on for final hearing upon complainant's bill and defendant's answers thereto and plaintiff's replication, and the evidence heretofore taken, and the findings of the special master in chancery filed herein, and the exceptions of the defendant to certain specified portions of the findings of fact of the special master, plaintiff appearing by R. J. Slater, her solicitor, and the defendant appearing by Hon. J. H. Hall, United States District Attorney, and the cause having heretofore been fully argued and submitted, and by the Court taken under advisement, and, being now fully advised in the premises, the Court finds that the exceptions to the findings of the special master are not well taken, and said exceptions are therefore overruled.

Wherefore, it is ordered, adjudged, and decreed, that the said report of the said special master in chancery in

this court, C. H. Carter, be, and the same is in all respects, confirmed. And it is further ordered, adjudged, and decreed, that the allotment heretofore made by J. B. Eddy and J. P. Bushee, as commissioners of the United States of America, of the following land, situate upon the Umatilla Indian Reservation, in Umatilla county, State of Oregon, to wit: The southeast quarter of section twenty (20), township three (3) north, of range thirty-four (34), E. W. M., to the defendant, Hy-yu-tse-mil-kin, which allotment was approved by the Honorable Secretary of the Interior, April 12, 1893, be, and the same is hereby, canceled. And said land is hereby allotted to the plaintiff, Philomme Smith, and plaintiff is entitled to the immediate possession thereof; and the defendant, Hy-yu-tse-mil-kin, his servants, and all persons holding under him as tenants, lessors, or otherwise, are perpetually enjoined and restrained from in any manner interfering with the plaintiff's possession thereof, and that said complainant have and recover from the defendant her costs and disbursements incurred in this suit, taxed at one hundred and thirty-seven and sixty-two one-hundredths dollars.

Dated this 10th day of July, A. D. 1901.

(Signed) CHARLES B. BELLINGER,
Judge.

Filed July 10, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 10th day of July, 1901, there was duly filed in said court an opinion, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

Opinion.

R. J. SLATER and J. F. HINKLE, for the Plaintiff.
JOHN H. HALL, as United States Attorney, for the Defendant.

BELLINGER, J.—The plaintiff is a full-blooded Indian woman of the Walla Walla tribe, having a white man for her husband. Prior to the allotment of lands on the Umatilla Indian Reservation to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing thereon, made in pursuance of the act of Congress of March 3, 1885, and during the year 1887, plaintiff made selection of the land in controversy, and had the same assigned to her by the reservation agent. She and her husband caused furrows to be plowed around the land so assigned, enclosed the same with a barbed-wire fence of two wires, dug a well, and erected some buildings. The

entire improvements, according to the finding of the referee, were of the value of from $700 to $775.

The allotment of lands was made early in the year 1891 by commissioners appointed for that purpose. Some years previous to this a census roll of the tribe to which plaintiff belonged was made up under the direction of the Interior Department, which did not include plaintiff's name, she being absent from the reservation at the time. A later list was made out containing the name of plaintiff among others, and this was forwarded to the Department at Washington. Whereupon the allotting commissioners were instructed to make inquiry as to the rights on the reservation of the subsequently listed persons. The commissioners took the testimony of the Indians in relation to the rights of these people and sent that testimony to the commissioner of Indian affairs at Washington, who decided that such Indians were not entitled to lands, and directed that no allotments be made to them. Accordingly, the commissioners refused to allot to plaintiff the lands selected and improved by her, but allotted them to the defendant. The decision of the Department against plaintiff's right to an allotment of lands was subsequently reconsidered and reversed, upon the advice of the Assistant Attorney General that his former opinion against plaintiff's right should not be followed and that the applicant was entitled to an allotment. Whereupon other and less valuable lands were allotted to the plaintiff, who accepted the same with the reservation that her act should not prejudice her right to the land in question and after the agent, in answer to her question, had informed her that in his opinion it

would not do so. She has leased a part of the land so allotted and received rental therefor.

The right of the plaintiff to an allotment having been decided in her favor, it does not appear upon what ground the Department refused to cancel the allotment made to the defendant, of the lands selected and improved by the plaintiff, and to allot such land to the plaintiff.

It is contended for the defendant that this refusal is conclusive of the question in this court, under the provisions of the act of March 3, 1885 (23 Stat. at Large, 340), which provided among other things, that the Secretary of the Interior shall have power to make needful rules and regulations to carry into effect the provisions of the allotting act, "and shall have power to determine all disputes and questions arising between Indians respecting their allotments." But the later act of August 15, 1894 (28 Stat. at Large, 305), confers upon the proper Circuit Courts of the United States "jurisdiction to try and determine any action, suit, or proceedings arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

Under this act jurisdiction has been exercised by a Circuit Court of the United States in a case like this to decree relief, notwithstanding the decision of the question by the Land Department. (Sloan vs. United States, 95 Fed. 193.) Jurisdiction is by this act conferred in terms that leave nothing to construction.

The findings of the special examiner are supported by the testimony which he reports. It is established by this

testimony, and has been decided by the Department, that the plaintiff is entitled to an allotment of lands. The act of Congress provides that allotments shall be made upon the selection made by the head of the family. The lands claimed were selected by plaintiff, who took possession of them and made considerable improvements thereon. This possession continued for a number of years, and until she was forcibly dispossessed by the action of the agents of the Government. If she was entitled to an allotment of lands, she was entitled to those lands, but for the decision of the department, subsequently reversed, there is no doubt but that the land claimed would have been allotted to her. If, then, a wrong has been done her, why should she be denied redress? Upon what principle of equity shall she be estopped to claim the relief prayed for, by the subsequent allotment of other lands to her? No one has been misled or prejudiced by that act. It was done in good faith, upon the advice of the agent and with the understanding that the plaintiff's right in the premises should not be thereby affected. If she has had rental from the allotted lands, it is presumably not more than she would have received from the more valuable land which she selected.

It is argued that she is not entitled to relief, because she has not offered to surrender the lands allotted her to the United States. No act on her part is necessary to extinguish her right in the allotment made her. The prayer of her complaint authorizes the canceling of such allotment in granting the relief which she asks. The defendant took with notice of plaintiff's rights. The man who reaps where others have sown cannot invoke an es-

toppel against those whose labor he appropriates. The defendant's consciousness of this is shown by his denial in his testimony that there were improvements of any kind on this land when it was allotted to him, although the fact is otherwise, and there is no question about it.

The plaintiff is entitled to the relief prayed for, and it is decreed accordingly.

Filed July 10, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 24th day of July, 1901, there was duly filed in said court a cost bill, in words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Oregon.

PHILOMME SMITH
vs.
HY-YU-TSE-MIL-KIN.

No. 2,595.
July 17, 1901.

Cost Bill.

Statement of disbursements claimed by the plaintiff in the above-entitled cause, viz.:

Clerk's fees	$26.00
Marshal's fees	32.32
Costs in State Circuit Court	
Attorneys' fee	20.00
Attorney's fee for taking ——— depositions, at $2.50 each	
Depositions	

Examiner's fees..... ....

Referee's fees..... .....

Witnesses' fees: F. A. Smith, 2 days and 30 miles travel..... .... 4.50

Ed Frisbo, 2 days and 10 miles travel..... .... 3.50

Mrs. Kitsin, 1 day and 30 miles travel..... .... 3.00

Fees of Special Master, C. H. Carter, $68.60, one-half charged..... ..... 34.30

Stenographer, J. S. Beckwith, $28.00, one-half charged..... .... 14.00

Total taxed at.....$137.62

J. A. SLADEN,
Clerk.

District of Oregon—ss.

I, R. J. Slater, being duly sworn, on my oath say that I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said plaintiff is entitled to recover the same from the defendant, as I verily believe.

R. J. SLATER.

Subscribed and sworn to before me this 20th day of July, 1901.

[Seal] J. T. HINKLE,
Notary Public for Oregon.

[Endorsed]: Filed July 24, 1901. J. A. Slater, Clerk.

And, to wit, on the 10th day of September, 1900, there was duly filed in said court the testimony taken before Charles H. Carter, special examiner, accompanying findings, in words and figures as follows, to wit:

Certificate of Special Examiner.

United States of America,
District and State of Oregon. } ss.

I, Chas. H. Carter, special examiner of the Circuit Court of the United States for the District of Oregon, in the cause in equity therein pending wherein Philomme Smith is complainant and Hy-yu-tse-mil-kin is defendant, hereby certify that pursuant to agreement between the parties aforesaid, by their solicitors and attorneys, the testimony in this cause was taken at 10 o'clock A. M., on July 31, 1900, at the courthouse of Umatilla County, Oregon, in the city of Pendleton, in that county, at which time the said parties and their respective attorneys and solicitors in person attended; that all of the witnesses then introduced by both parties were by me sworn to tell the truth, the whole truth, and nothing but the truth before they were examined or allowed to testify; that plaintiff introduced three witnesses, to wit: W. A. Smith, Philomme Smith, and Edward Brisbo, and defendant introduced four witnesses, to wit: Louis Chalifoe, Albert Minthorn, the defendant, Hy-yu-tse-mil-kin, and Charles Wilkins; that by special agreement between the parties, by their said attorneys, then made, the signing of their respective depositions by the witnesses was waived, and the testimony of the said witnesses was taken by J. S. Beckwith, in shorthand, and by him transcribed upon the

typewriter, and the same is herewith returned to the clerk of the said Circuit Court; and that the said testimony was taken between the hours of 10 o'clock A. M. and 6 o'clock P. M., the parties and their said attorneys being present the whole day before me at said time and place; that all of said testimony, together with all exhibits introduced, are herewith returned to the clerk of the said Circuit Court.

Dated this 7th day of September, 1900.

CHAS. H. CARTER,
Special Examiner.

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PHILOMME SMITH,
Plaintiff

vs.

HY-YU-TSE-MIL-KIN,
Defendant.

Testimony Accompanying Findings of Special Examiner.

This cause coming on regularly for the taking of the testimony in said cause before Honorable Charles H. Carter, the duly appointed, qualified and acting special referee therein, on this the 31st day of July, 1900, at the courthouse in Pendleton, Umatilla county, Oregon, at the hour of ten o'clock of said day, when the following proceedings were had, to wit:

The plaintiff appearing in person and by her counsel, J. H. Slater, and the defendant appearing in person and by his counsel, John H. Hall, United States Attorney.

W. A. SMITH was called as a witness on the part of the plaintiff, testified as follows, being first duly sworn by the special referee.

Direct Examination.

(By Mr. SLATER.)

Q. State your name, age, residence and occupation.

A. My name is W. A. Smith; my age is going on sixty-six years; farming is my occupation; I reside on the reservation, Umatilla county.

Q. What relation do you sustain to the plaintiff, Philomme Smith? A. She is my wife.

Q. When were you married to her?

A. The 16th of January, 1861.

Q. Where? A. The Dalles, Wasco county.

Q. How old was she when you married her?

A. I understood—we didn't know for certain, her age—I understood she was going on thirteen.

Q. From whom did you get that information?

A. From her mother.

Q. Was her mother with her? A. Yes, sir.

Q. Who was her mother?

A. She claimed to be a Walla Walla Indian.

Q. Was she a full-blooded Indian? A. Yes, sir.

Q. Do you know anything about the father of your wife? A. Only hearsay; I never seen him.

Q. Where was he at the time you married your wife?

A. He was dead.

Q. Do you know how long he had been dead?

A. I do not; several years, though.

(Testimony of W. A. Smith.)

Q. From the conversations with your wife's mother can you testify as to her blood; whether she was a white person or an Indian person?

A. I should say she was a full-blooded Indian; she had that appearance.

Q. What language did she speak?

A. Four or five different languages—Indian languages; Walla Walla, Cayuse and some Snake.

Q. Were you familiar with these languages?

A. No, sir; not particularly; I can't say I was.

Q. Could you talk any of them? A. No, sir.

Q. Could you distinguish them?

A. I could distinguish the Walla Walla and Wasco Indians.

Q. State if you know, where your wife and her mother were living at the time you married your wife.

A. They were living at the Dalles.

Q. Was that their home?

A. They were just merely coming from home, from the French Prairie.

Q. Were they traveling? A. Yes, sir.

Q. In what direction? A. Coming up this way.

Q. When did you first come to the Umatilla Reservation?

A. To live, or the first time I ever saw them?

Q. To live. A. I came in 1888 to live here.

Q. Who came with you?

A. My wife and family and her sister.

Q. Have you any children by this woman?

(Testimony of W. A. Smith.)

A. I had eight.

Q. How many were with you when you came to the reservation?

A. One of them came in the fall of 1887 before me.

Q. How many came with you? A. Seven.

Q. Why did you come to the reservation?

A. I came to take land on the reservation.

Q. Who gave you authority to come on the reservation? A. The agent and the Indian chiefs.

Q. What agent? A. Mr. Coffee.

Q. What chiefs? A. Homily and Showaway.

Q. Who was Homily?

A. The Walla Walla chief.

Q. Who was Showaway? A. The Cayuse chief.

Q. You are familiar with the land in controversy in this matter, are you not? A. Yes, sir.

Q. When you got on the reservation what did you do?

A. I marked that piece of land off as land for our family.

Q. How did you happen to do that?

A. We wanted to take a home for the family.

Q. Did you consult anybody about it?

A. I consulted Coffee, the agent, and Homily.

Q. What did Homily tell you?

A. He said take the land.

Q. How much did you take?

A. Five hundred and sixty acres.

Q. Why did you take five hundred and sixty acres?

A. Because my family and wife were all entitled to five hundred and sixty acres.

(Testimony of W. A. Smith.)

Q. You did this for your wife?

A. And eight children.

Q. You had no rights of your own on the reservation?

A. No, sir.

Q. You are a white man? A. Yes, sir.

Q. You claimed no rights on the reservation. You did this in the right of your wife and her children?

A. Yes, sir.

Q. State what you know from the history of your wife's family as to where she was born.

(Objected to by counsel for the Government unless he knows, as incompetent.)

A. I don't know; all I know about it is what I heard.

By the COURT.—If he knows anything about where she was born he can say so.

A. I don't know where she was born, only what I heard.

Q. From whom did you hear anything about that matter? A. From her mother.

Q. From what her mother told you please state what you know about where she was born.

(Same objection by counsel for the defendant. Objection sustained, and the witness instructed that he may answer, because counsel for the plaintiff insists upon an answer.)

A. She told me she was born at Wallula.

Q. State, Mr. Smith, when it was your wife and family first took possession of this land in controversy.

A. I marked that land off in April, 1888, and a little

(Testimony of W. A. Smith.)

while after that I went to work on it and took a plow and plowed around it.

Q. Were there any improvements on the land at that time? A. No, sir.

Q. Was anybody in possession of it at that time?

A. I never heard of anybody being on the place at all. There was nothing there.

Q. Did your wife move upon that tract of land?

A. No, sir; she never lived upon that particular tract.

Q. Where did she live?

A. Right across from that on another piece of land.

Q. Was that a part of the five hundred and sixty acres she selected? A. Yes, sir.

Q. State what improvements your wife made upon this particular tract of land.

A. There was a house, a small cabin built for a granary, and there was a barn built on it, and a well dug on it, and a few years ago I built another barn on it.

Q. Any other improvements?

A. And fences; a mile and a quarter of fence.

Q. Describe how the place was fenced.

A. It is the southwest corner of the piece and I run for a half mile and joined in with John Ralston, and run south to the corner where John Ralston's place is, for a half mile and turned north again and run for a quarter of a mile, and then ran it to McDaniel's corner, and then run north a quarter and then joined with McDaniel.

Q. Did this fencing inclose the whole tract?

A. Yes, sir.

Q. What was the character of the well you dug there?

(Testimony of W. A. Smith.)

A. We dug a well forty-five feet deep.

Q. What kind of material did you get there?

A. Most of it was hard rock.

Q. What was the reasonable value of these improvements?

A. Well, I think the well was worth $250, and the barn worth $250; the house is worth $75; the fence was worth, the posts were worth $6 delivered, and the wire $7.50—I gave for it; there was ten bales of wire—1,000 pounds, $75, and there was the posts at $6 per hundred and putting up the fence; two men could put the fence in two days; could dig the post holes and put it up in about five or six days.

Q. How long did your wife have possession of that place?

A. She lived on that place from the time we moved on in the fall, after we got the well started—we worked on the well that winter and that fall. We had possession of that place up until, I should think, about 1897; we lived there until 1897, but not right on that particular piece.

Q. Why did you leave it at all?

A. We were ordered to leave.

Q. By whom? A. By the Indian agent.

Q. Was your wife and family there in 1891-92, when the allotments were made? A. Yes, sir.

Q. What, if any, action did your wife take, in regard to selecting this particular quarter section of land as her allotment?

A. When they commenced allotting she claimed that

(Testimony of W. A. Smith.)

as hers; I went to the land agent and wanted him to allot it to her, and she went with me.

Q. What action did they take?

A. They said they couldn't allot us.

Q. Did they allot it?

A. No, sir; they never did.

Q. What did they do?

A. They never did anything in regard to allotting her.

Q. What reason, if any, did they give?

A. They said her name was not on the enrolled list.

Q. Who took possession of the land after you left?

A. I don't know; there was some white men there; Mosgroves took possession of it and farmed it.

Q. Do you know by what authority?

A. I don't know; only they decided we had to give up the land.

Q. Did you ever see the defendant on the land?

A. Yes, sir; I seen him when the land was appraised.

Q. Did you ever talk with him about it?

A. No, sir; I never did; I couldn't talk with him.

Q. At the time this appraisement you speak of was made, who made that appraisement?

A. Mr. Harper, the agent, and Guyer, the clerk.

Q. Who was Harper?

A. The agent of the Umatilla Indian Reservation.

Q. At the time these allotments were made was your wife living upon this tract?

A. Right opposite that piece of land.

Q. She was not living on the land in controversy?

(Testimony of W. A. Smith.)

A. No, sir; she never lived on that piece.

Q. How far away?

A. About twenty steps, inside another field.

Q. Why didn't she live on that piece?

A. Because I built on what is known as the children's land.

Q. They had not at that time divided up the land?

A. No, sir.

Q. All living there together? A. Yes, sir.

Q. You held the place, then, as a family farm?

A. Yes, sir; the oldest son he claimed land separate, which run across the line, and he claimed his separate, because he was twenty-five or thirty years old.

Q. Do you know whether or not the defendant had any knowledge of your wife's claim upon this land?

A. He must surely, because it was fenced before he allotted on it; he claimed other land right above me there.

Q. Prior to that time? A. Yes, sir.

Q. Where was that?

A. Right east of the piece in dispute.

Q. Do you know why he didn't select that land?

A. He got in a lawsuit and another Indian took it away from him, I believe; that is what I understand.

Cross-Examination.

(By Mr. HALL.)

Q. How long had you been living at The Dalles when you were married?

(Testimony of W. A. Smith.)

A. I came there in 1857; that is, I came back; I went there in 1852; I went to Southern Oregon and came back.

Q. How long had your wife been living there when you were married?

A. She came there in the fall of 1860, and along in the spring of 1861 I married her.

Q. Were they camping there or living in a house?

A. They were living in a house; they had been camped; her sister and folks, they had been camping and had moved off down the river on a ranch; they had taken up a ranch.

Q. What was her mother doing there for a living?

A. She was stopping with her sister at that time. After I married her, my wife—she was stopping at The Dalles with another family I was acquainted with, and I married her there.

Q. White people?

A. No, sir, Indians; that is, the woman's husband was white, and the woman was an Indian.

Q. What language did your wife speak then?

A. French and Chinook; at that time she couldn't speak the Walla Walla language.

Q. She talked good French?

A. Very good French, I guess.

Q. Did you reside at The Dalles from 1861 until 1888?

A. In that vicinity; in that county; one summer I went across to Mount Adams.

Q. How did you happen to be here to make the selections?

(Testimony of W. A. Smith.)

A. McDaniels and several Indians spoke to us and told us to come over here—they were down there visiting —and they told us we belonged here and to come and get our land.

Q. And that is all you knew about it?

A. That is all I knew; told us to come and get our rights.

Q. They were just passing there?

A. No, sir; they came there to visit my wife's mother and the family. I didn't know the Indians myself, but they knew my wife's mother when she had been in this country. Her husband and her were traders, or trappers; she was the wife of an old trapper, who used to be all through this country.

Q. A white man?

A. No, sir; he was an Indian, so they said; I never seen the man.

Q. You came here in 1888 and you settled on the northeast quarter of section 29?

A. We had taken that land up.

Q. That is where you built your house?

A. Yes, sir.

Q. And your barn?

A. No, sir; I built another barn in 1889.

Q. What improvements did you put on section 29?

A. I built a house and fenced it up.

Q. When did you build the house?

A. In the fall of 1888.

Q. So that all the improvements were put on that year?

(Testimony of W. A. Smith.)

A. No; I fenced up some of the land.

Q. What land? A. That on section 29.

Q. What improvements did you make in 1889?

A. On that identical piece?

Q. Yes, sir; when did you make the first improvements on the southeast quarter of section 20, being the land here in controversy?

A. In section 20, in 1888 was the first improvements I made on that.

Q. What were they?

A. Plowing around it, marked it off and digging a well, or starting the well, rather.

Q. You dug a well, starting it by digging a hole six or eight feet deep and left it, didn't you?

A. No, sir; I dug a hole twenty-seven feet, I think it was, before I got down in the hard rock, then I got another man to help me.

Q. Was that in 1888? A. Yes, sir.

Q. How deep did you sink that well in 1888?

A. Twenty-seven feet, I think.

Q. You didn't get water? A. No, sir.

Q. You then abandoned it?

A. No, sir; kept working on it when I had time.

Q. When did you reach water with that well?

A. In 1889, I think.

Q. Did you do that yourself?

A. I helped do it.

Q. It was under your supervision?

A. Yes, sir.

(Testimony of W. A. Smith.)

Q. Did you pay for it? A. Part of it.

Q. Who paid for the other part of it?

A. Rube Wilson.

Q. Why?

A. Because he had land rented near it.

Q. In what part of the section was that?

A. In section 29; he had the northwest quarter of section 29 and one-half of the northeast quarter of section 29.

Q. One-half of the east half?

A. No, sir; of the west half.

Q. And that is where your house was?

A. No, sir; the house was close to it.

Q. Wasn't your house on the northwest quarter of section 29? A. No, sir; on the east half of 29.

Q. Where was the well—immediately north of that?

A. Yes, sir; immediately north of that.

Q. How much of this well did you dig at the time this man Wilson helped you?

A. From twenty-seven feet down; he helped dig the balance of it until we struck water.

Q. How deep was it? A. Forty-five feet.

Q. Was that dug in 1889?

A. I think it was; we commenced in 1888 and finished it in 1889—I think in the fall of 1889 we got water.

Q. What is the ordinary cost per foot of digging a well out there when you let it by contract? What did this well cost?

A. A good deal; I don't know exactly.

Q. Do you know about what it cost?

(Testimony of W. A. Smith.)

A. I don't know exactly; I know it cost a terrible lot; I had to buy giant-powder, fuse and hired men. I think I paid one man $29.00, but he didn't do much; he made it a little larger around; that is all. I waited on him awhile and he was picking around. I know I was $29.00 out.

Q. You say you made these selections by going out on the place, selecting the land and plowing around it?

A. Yes, sir.

Q. Was that before you moved or not?

A. Before I moved; I came here and selected that land and then went away and then came back.

Q. Did you leave your family in The Dalles?

A. Yes, sir; and then we came up to see if we could get the land.

Q. You were doubtful about it? A. Yes, sir.

Q. What other improvements did you put upon section 29 in 1889? A. Built a barn on it.

Q. How big was it?

A. I think twenty by twenty-four or twenty-six feet. I am not sure, but I think twenty by twenty-four.

Q. It was a log barn covered with shakes?

A. Yes, sir.

Q. How much did it cost you? A. I don't know.

Q. This other man helped you build it?

A. Yes, sir; and there is a fourteen-foot shed on each side of the barn all covered with shakes.

Q. You went in and built it together?

A. No, sir; I had the man hired to help me.

Q. You didn't have this man Rube Wilson hired?

(Testimony of W. A. Smith.)

A. No, sir; he didn't help me.

Q. How much did the barn cost you?

A. I guess about $250.00, labor, shakes and everything.

Q. How do you figure it?

A. I imagine it cost about that much.

Q. Did you figure it up? A. No, sir.

Q. How far did you go for timber?

A. Twelve or fifteen miles.

Q. You guessed it at $250.00?

A. Yes, sir; with the lumber that made the sheds on each side.

Q. What was the lumber worth?

A. Seventeen dollars I think I paid for rough lumber.

Q. What other improvements did you make in 1889, if any?

A. I don't think I made any except in the fence; no, I didn't build that fence that year, only a little around it.

Q. In 1890 what improvements did you make on that piece?

A. We built a cabin there for holding the ground.

Q. How big a cabin?

A. I think fourteen by sixteen feet.

Q. What did you build it out of?

A. Logs.

Q. What do you estimate that cost you?

A. Seventy-five dollars.

Q. That was a kind of granary?

(Testimony of W. A. Smith.)

A. Yes sir; we used it for a granary to store our barley or wheat in.

Q. You never lived in it?

A. No, sir; the hired man slept in there occasionally.

Q. Did you make any other improvements there in 1890?

A. I think I put the fence, or the balance of it up in 1890; I would not swear positively whether it was 1890 or 1891.

Q. Was it one of those years? A. Yes, sir.

Q. That you say was a post and wire fence?

A. Yes, sir.

Q. How many wires? A. Two wires.

Q. According to your estimate that fence would cost you about $320.00?

A. I never figured it up. I know it cost about $7.50 for wire per hundred.

Q. You gave the figures at 1,000 pounds of wire at $7.50, $75.00, four hundred posts at six cents, $240.00, and $5.00 for setting, which makes a total of $320.00. All of these improvements, then, you say was put on prior to 1892?

A. Yes, sir; they were all put on prior to 1892.

Q. Did you put anything on there after 1892?

A. I think I put on another wire fence around the barn. It was taken down a time or two and put around the house on the other side, and then I went back and put on three wires.

Q. That was after these allotments were made to the defendant?

(Testimony of W. A. Smith.)

A. No, sir; I think they were put on before—yes, I know it was.

Q. Some of the improvements you put on after the allotments?

A. Yes, sir; the barn was put on afterwards.

Q. That is the barn you claim cost $250?

A. I claim $300 for that.

Q. Do you claim two barns, one $250 and another $300? A. Yes, sir.

Q. Was that all the improvements you placed on after the allotment?

A. Yes, sir; nothing else after the allotments.

Q. Did you ever receive any money from the agent or the defendant, Hy-yu-tse-mil-kin, for any of these improvements?

A. No, sir; I never received a cent or heard of any.

Q. Did you not have a conversation with Hy-yu-tse-mil-kin, yourself and him being present on the reservation, wherein you agreed with him in regard to what your improvements would be and what he should pay you?

A. I never talked with him at all.

Q. Did you ever talk with him through an interpreter?

A. No, sir.

Q. Did you ever talk with Harper, the agent, as to what you should be paid for it—was nothing ever said about any payments to your wife?

A. No, sir.

Q. Your wife never had anything much to say about the management of the place—you did that?

A. Most generally; yes, sir.

(Testimony of W. A. Smith.)

Q. When the allotting agents came you made these selections?

A. I made the selections before the allotting agents ever came.

Q. And when he did come you reselected them?

A. My wife and children did.

Q. Your wife never had anything to do with it?

A. Yes, sir; the Indians came when I was away and told her to take the land.

Q. You made the demand upon the allotting agents yourself? A. Yes, sir; but she went with me.

Q. You did the talking? A. Yes, sir.

Q. You afterwards made another selection, didn't you, of land after you had been ousted of this?

A. We selected some two or three years ago perhaps.

Q. You selected one piece, didn't you, and gave that up and then selected another?

A. Yes, sir; we selected one piece and gave it up and selected another.

Q. Your wife now holds as an allottee lots 13 and 14, section 36, township 3 north, of range 33 east, and lot 3 of section 5, township 2, and the southwest quarter of the northeast quarter of section 33, does she not?

(Objected to by counsel for the plaintiff as incompetent, immaterial, and irrelevant, for the reason that if there is any such allotment the record is the only and best evidence.)

Q. She is not in possession of that land?

A. No, sir.

(Testimony of W. A. Smith.)

Q. Is she not in possession as landlord and having a tenant upon it?

A. She has a tenant on 36.

Q. In section 36? A. Yes, sir.

Q. Will you say it is not in 33?

A. I would not swear positively, but the land we selected, she signed a lease for. I think though, it is in 36.

Q. How long ago was that?

A. Three or four years ago, the first time we leased it, and then she leased it again for two crops last fall or winter, I think it was, I don't remember the time we leased it, but it was to a man by the name of Snyder.

Q. Who gets the rents and profits?

A. She got part of it; he didn't pay it all.

Q. Who did he agree to pay it to?

A. To her.

Q. How much an acre does she get for it?

A. Three dollars per acre.

Q. Has that been the rental price since she has been renting it?

A. No, sir; I think the first rental price was $2.50.

Q. Is that the least she has rented it for?

A. Yes, sir.

Q. Eighty acres?

A. There is only seventy acres, he told me.

Q. He has other lands of hers that she is in possession of? A. No, sir.

Q. Isn't she in possession of forty-six and twenty-one hundredths acres? A. No, sir.

Q. Do you know whether or not there was that amount of land which was allotted to her?

(Testimony of W. A. Smith.)

Q. Did you understand at that time, or did your wife at any time go to the agent and make a selection of that land? A. No, sir; she never did.

Q. What has she done towards giving up her claims to the land in controversy?

A. She has never given them up at all.

Q. Who did she tell that?

A. She told it to me and several.

Q. Do you know whether she ever told the agent or not?

A. I don't know whether she ever told the agent or not; she was only there once or twice.

Q. Was your wife present at the time Harper talked to you about this land? A. No, sir.

Recross-Examination.

Q. You never plowed or raised any crop on the south-east quarter of 20?

A. I plowed it; a good deal of it.

Q. You never raised any crop upon it?

A. No, sir.

Q. How much did you plow?

A. The biggest part of the quarter,

Q. Isn't it a fact you run a fence around it and used it for pastures? A. I used it for pastures; yes, sir.

Q. The only use you made was for pasture?

A. I started in to plow it.

Q. The only benefit you ever had of it was for pasture?

A. That is all.

(Testimony of W. A. Smith.)

Redirect Examination.

Q. Why didn't you get the use of your plowing?

A. I was stopped by the agent.

Q. When was that?

A. I think that was in 1891 or 1892; I am not positive.

Q. Did you ever improve this other land you say you selected? A. No, sir.

Q. Why didn't you do that?

A. This last piece—seventy or eighty acres? I was only on that once that I remember of, since it was fenced. That was the time I went to look at it.

Q. What kind of a piece is it for making a home upon?

(Objected to by plaintiff's counsel as immaterial.)

A. I don't think I should like to live upon it.

Q. There is no water upon it?

A. They say there is not.

Q. How does it lay with reference to the Umatilla River?

A. It lays about a mile from the Umatilla River, right along on the hill, on the face of the hill, like; a big canyon goes right down through it—on this end of it at least—east and west and on this side of it there is a steep hill.

Q. Is it such a place as your wife would be inclined to select as a home? A. No, sir.

Recross-Examination.

Q. Where do you live now?

A. Up here on the reservation.

Q. On whose land?

A. Piece I selected for one of my children.

(Testimony of W. A. Smith.)

Q. Which one? A. William Smith.

Q. When was he allotted?

A. He never was allotted; none of them was ever allotted.

Q. How did he get this land?

A. I took it for him; we had other land.

Q. How did he get land on the reservation without being allotted?

A. There is a good many people—I took the land myself for him—he has a right on the reservation, and had land on the reservation and fenced and farmed it.

Q. What section is that in? A. I don't know.

(By the COURT.)

Q. To whom was that land allotted that your son William is living on?

A. The forty was allotted to Be Yet.

Q. You say your son, William Smith, occupies some land in his own right?

A. No, sir; I claim that—when they were allotting the land they throwed him out entirely—then he died and I took this piece up that I am now living on.

Q. To whom is this piece you now live on allotted?

A. To no one that I know of.

(By Mr. SLATER—Resuming.)

Q. You mean you selected that as his allotment—from whom? A. Harper.

Recross-Examination.

Q. You mean after he was dead?

A. Yes, sir; after he was dead.

Mrs. W. A. SMITH, called and sworn as a witness on the part of the plaintiff, testified as follows—Edward Brisboe sworn as interpreter.

Direct Examination.

(By Mr. SLATER.)

Q. State your name. A. *Philomay* Smith.

Q. How old are you?

A. She thinks she is about sixty-five; she is not positive.

Q. Where do you live?

A. At the present time she says she lives on the reservation.

Q. How long have you lived there?

A. Eleven years.

Q. Are you an Indian woman? A. Yes, sir.

Q. Who was your mother?

A. She was a half Walla Walla and half Umatilla.

Q. Where did your mother live?

A. She was raised here and kept traveling; lived in different parts of Walla Walla Valley.

Q. Where were you born?

A. She was born over here—down to Wallula Junction.

Q. Who was her father?

A. He was an Iroquois.

Q. What did he do for a living?

A. He was traveling around like the rest of the trappers.

Q. Who did he trap for?

A. She don't know who for.

Q. What relation is W. A. Smith to her?

(Testimony of Mrs. W. A. Smith.)

A. Her husband.

Q. When did she marry Smith?

A. She don't know when she did marry him; she forgot the date.

Q. Where did she live at that time?

A. The Dalles.

Q. When did she come to the Umatilla Reservation?

A. Eleven years ago.

Q. Who told her to come to the reservation?

A. There was several wrote to her to come there; said she had a right over here as much as the rest of them.

Q. Did she take some land when she came on the reservation?

A. At first she came on a visit to see how the matter stood and then went back.

Q. Who did she talk with at that time?

A. She had a talk with Chief Homily.

Q. Anybody else?

A. And also Coffee, the agent there.

Q. What did he (Homily) tell her?

(Objected to by defendant's counsel as hearsay. Objection sustained.)

Q. Did Homily tell you to remain on the reservation?

A. Yes, sir.

Q. Did he tell you to take up land?

(Same objection by counsel for the defendant. Objection sustained by the Court.)

Q. Did he permit you to remain on the reservation; did he allow you to take land upon the reservation?

(Testimony of Mrs. W. A. Smith.)

A. Yes, sir; allowed them to take land.

Q. Did he show you where to go and get land?

A. Yes, sir; he went over and showed her what piece to take.

Q. Did you have any children at that time?

A. Yes, sir; had eight children.

Q. Did you select land for them as well as yourself?

A. Yes, sir.

Q. Do you know how much it was altogether?

A. No, sir; she don't know how much altogether.

Q. Did you mark this land out on the surface any way?

A. Yes, sir; she marked it with a plow.

Q. Did you go upon this land to live there?

A. Yes, sir.

Q. Did you live upon the land that you selected for yourself? A. No, sir.

Q. Were you living there upon the reservation and upon the land selected by you for your children when the allotting agents came to allot the land?

A. Yes, sir; she was stopping on her children's land.

Q. Did you go to the allotting agents and tell them that you wanted to select this land for yourself and children?

A. Yes, sir; she went and says they told her she didn't have her name on the list.

Q. Did they allot her any land at that time?

A. No.

Q. What did they do with the land she had selected?

A. Allotted it to somebody else. She says she stopped there until they drove them out of there.

(Testimony of Mrs. W. A. Smith.)

Q. Did she make any improvements on this land she had selected for herself?

A. All the improvements that was made are there yet, the one hundred and sixty acres she selected for herself.

Q. Why did she leave the land?

A. They told her she had no right to stay there and had to leave.

Q. Who told her that? A. Harper.

Q. Who was Harper? A. He was agent.

Q. Do you know anything about the value of the improvements? A. No, she don't.

Cross-Examination.

(By Mr. HALL.)

Q. Do you remember your father?

A. No, she was too young when he died.

Q. Where were you living when he died?

A. She was living in Willamette Valley when he died.

Q. Your mother was married to him down there, was she not? A. Yes, sir.

Q. At French Prairie?

A. She don't know where they were married at.

Q. She was born down there?

A. No, sir; she was born at Wallula Junction.

Q. That is what her mother told her?

A. Yes, sir.

Q. Where is her mother? A. Dead.

Q. How long has she been dead?

A. About fourteen years.

(Testimony of Mrs. W. A. Smith.)

Q. She never remembers of living up in this country, does she?

A. No, she don't remember when she lived in this country; she was too young.

Q. What language did her mother speak?

A. She used to talk Walla Walla, Iroquois, and French.

Q. Whereabouts on French Prairie did they live?

A. At a place called St. Paul.

Q. Does she know anybody in St. Paul now?

A. She used to know several there but don't know any now.

Q. Ask her if she knew Caalifou.

A. Yes, sir; she used to know Caalifou down there.

Q. What was your mother's name?

A. Her name was Francois.

Q. Was that the name she went by?

A. She says they called her Francis.

Q. Ask her if her mother had any other name.

A. She don't know; she might have had an Indian name.

Q. Ask her if she had any other French name besides that. A. Saufia was her husband's name.

Q. Her mother's name was Francis Saufia?

A. Yes, sir.

Q. Ask her if she can speak Walla Walla.

A. She understands it but cannot talk it.

Q. She learned that since she came here on the reservation?

A. Yes, sir; learned that much since coming here.

(Testimony of Mrs. W. A. Smith.)

Q. She never heard her mother speak Walla Walla?

A. Yes, sir; heard her speak Walla Walla.

Q. How old were you when you were married?

A. About fourteen years.

Q. Then you lived at The Dalles after you were married until eleven years ago?

A. Yes, sir; always stopped at The Dalles until we moved up here.

Q. Didn't you come up here at your husband's suggestion, to make a selection of land?

A. Yes, sir.

Q. When you came upon the reservation to get the land, didn't your husband make the selections of the land himself? A. Her husband did.

Q. She never selected any of this land herself at all?

A. Yes, sir; she took it herself.

Q. Her husband picked it out?

A. Yes, sir; her husband marked it out, then she picked out her place.

Q. The husband selected the whole tract and then she took her lot out of that?

A. Yes, sir; she took her piece off of that after it was marked.

Q. Ask her if her husband didn't furnish all the money to build the house and all the fencing that was done upon her piece of land.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled by the Court.)

(Testimony of Mrs. W. A. Smith.)

A. Yes, sir; she says he did.

Q. You never gave your husband any money to pay for the improvements that he put upon this land?

A. No, sir; she don't think she did.

Q. Did you ever rent this piece of land that you claim as yours, being the one given to Hy-yu-tse-mil-kin?

(Objected to by plaintiff's counsel as immaterial. Objection overruled by the Court.)

A. She says she never rented it to anybody.

Q. Did she ever raise a crop on it?

A. No, sir.

Q. Did she ever do anything with it except to put a two-wire fence around it and use it for pasture?

A. She can't recollect of it, she says.

Redirect Examination.

Q. Your husband is a white man, is he not?

A. Yes, sir; he is a white man.

Q. He came with you upon the reservation, didn't he?

A. Yes, sir; both came together on the reservation.

Q. The improvements he made upon this land and the money he paid for them was for your use and benefit, wasn't it?

(Objected to by defendant's counsel as leading and suggestive. Objection overruled.)

A. Yes, sir; she says it was.

Q. When your husband talked to the allotting agents you were with him, were you not?

(Objected to by defendant's counsel as leading and not in response to anything drawn out on cross-examination.

(Testimony of Mrs. W. A. Smith.)

Objection overruled by the Court as being preliminary question.)

A. Yes, sir; she was present.

Q. You understood what was said by him to the allotting agents, didn't you?

A. Yes, sir; she understood enough to hear him. He said her name was not on the list.

(Plaintiff's counsel then offered in evidence papers and letters identified as Plaintiff's Exhibit "A," which were duly admitted and marked Exhibit "A" as requested.)

Q. You were asked upon cross-examination about your mother's name; please state whether your mother was married more than once.

A. Yes, sir; she was married twice.

Q. What was her first husband's name?

A. Thomas Jauchin.

Q. What was the name of her second husband?

A. Saufia.

Q. Which was your father?

A. Thomas Jauchin.

Recross-Examination.

Q. How do you know?

A. Her mother told her so.

Q. Do you remember your father?

A. No, she was too young when her father died.

Q. How old were you when your mother married the second time?

A. She just recollects it; that is about all.

Q. How many years old were you?

(Testimony of Mrs. W. A. Smith.)

A. She can't say how old she was; she just recollects it; that is all.

Q. How old were you when Saufia died?

A. About ten or eleven years old.

Q. Were you always called Philimene Saufia?

A. Sometimes they used to call her that name.

EDWARD BRISBO, called as a witness on the part of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SLATER.)

Q. State your name and age.

A. Edward Brisbo; aged about forty-seven.

Q. Where do you live?

A. On the Umatilla reservation.

Q. How long have you lived there?

A. On the reservation about fourteen years.

Q. Are you acquainted with the plaintiff, Philimene Smith?

A. Yes, sir; I am acquainted with her; have known her ever since they got back to this country.

Q. Were you acquainted with Homily, chief of the Walla Wallas, during his lifetime?

A. Yes, sir; I recollect him since I was knee high.

Q. Do you recollect the time when the plaintiff came to reside upon the reservation first? A. Yes, sir.

Q. Were you present at any time when Homily was present and the plaintiff, Philimene Smith, was present,

(Testimony of Edward Brisbo.)

when Homily and other Indians were considering her rights upon the reservation?

A. I was one time; yes, sir.

Q. Did you hear Homily make any statement in regard to the matter?

(Objected to by defendant's counsel as incompetent, immaterial, and irrelevant and hearsay evidence. Objection sustained by the Court as leading and hearsay.)

Q. State what was done at that time and what occurred at that time.

A. How do you mean what occurred? Where she was on the ground that she is in dispute about?

Q. At the time you say you were present when Homily was present and the plaintiff was present and her rights upon the reservation were being considered, state what was said and done at that time in regard to that matter.

A. There was a meeting held at the Agency; at the time Moorhouse was agent, and some one had a dispute over their right, and I was one of them, and that woman was there and Homily said I was one of them that belonged here on this reservation, that I was related to him, and also I belonged to this reservation, and also said that woman belonged the same as I did on the Walla Walla side. That is all he said in regard to the woman; that she belonged there, too.

Q. Do you know anything about this woman taking land on the reservation?

A. She already had marked her land.

(Testimony of Edward Brisbo.)

Q. Do you know whether Homily had anything to do with her marking that [illegible]d or not?

A. No, sir; I do not.

Cross-Examination.

Q. Isn't it a fact, Brisbo, that you and these other Indians had to pay Homily in order to get this allotment?

A. No, sir; I didn't have to pay a quarter of a dollar to Homily.

Q. Who did you pay it to?

A. That is another question.

By the COURT.—You will have to answer it.

A. I don't know as I paid any money to anybody.

Q. You spoke as though you paid some money to somebody—who did you pay it to? You spoke of not paying it to him.

A. I don't know as I paid any money to anybody.

Q. Did you pay any money to be recognized in the tribe? A. No, sir.

Q. Did you pay any money for any purpose?

A. No, sir.

Q. Did you pay any money to anybody?

A. No, sir; not that I know of.

Q. What did you pay the money for?

A. I didn't pay any money.

Q. Why did you say that was another question?

A. I might have given somebody else—some white man some money; I didn't give it in regard to proving my right. I might have given it to him as a present for all I care.

estimony of Edward Brisbo.)

Q. Did Smith do the same thing?

A. I don't know whether he did or not.

Q. You say you didn't pay any money directly to Homily—did you understand the money you paid was to go to him?

A. No, sir; he never mentioned any money to me; I was a nephew to him.

Q. You were not on the original roll, were you?

A. No, sir; because I was one year too late.

Q. Was you here when the roll was made up?

A. No, sir; I came in the fall, a little too late.

Q. When was this meeting held that you refer to?

A. I believe it was in 1890.

Q. That was the first time Homily or the Indians recognized Mrs. Smith?

A. As far as I know, yes, sir. They held another meeting before that I know nothing of.

Q. Are you a full-blood Indian?

A. No, sir; I am a half-breed; my mother is full-blooded Indian and father is a Canadian French.

Q. You don't know whether Mrs. Smith is or not?

A. No, sir; I do not.

The plaintiff, by her counsel, here moves the referee to adjourn this hearing until to-morrow morning at ten o'clock, or at some other different time in the future, for the purpose of taking the testimony of Peter Kittsou, a material witness on behalf of the plaintiff, which witness the plaintiff states will testify, if permitted, to the following facts: That he is acquainted with the plaintiff,

(Testimony of Charles Choliou.)

and has known her since childhood, and knew her mother, and knows that her mother was a full-blooded Indian woman, and a member of the Walla Walla band of Indians, and resided at or near Wallula, now in the State of Washington. That this witness was not known to the counsel as being a material witness until this cause was called, and he resides about twelve or fifteen miles from this place, and cannot be produced here before ten o'clock on to-morrow morning, and at that time, if the hearing is postponed for that time, he can and will be produced by the plaintiff as a witness in her behalf and will testify to the facts as stated above.

Counsel for the Government decline to admit that the witness will testify as indicated by counsel, and decline to agree to a continuance of the cause.

The motion for continuance was then overruled by the special examiner.

Plaintiff's counsel then stated that he rested his case in chief.

Counsel on behalf of the Government moves the Court for an order dismissing the plaintiff's bill as being without equity, and the plaintiff having established no cause of suit by the testimony against the defendant. The special examiner declines to pass up the last-named motion.

Whereupon the defendant's counsel called CHARLES CHOLIOU as a witness, who being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. Where do you live?

(Testimony of Charles Choliou.)

A. On the reservation.

Q. How long have you lived there?

A. About thirteen years.

Q. Are you married to an Indian woman?

A. A mixed blood; half-breed.

Q. And an allottee? A. Yes, sir.

Q. Where were you born?

A. In the Willamette Valley.

Q. How old are you?

A. Fifty-four years old. About three miles from St. Paul, Marion county.

Q. State whether or not you knew Mrs. Smith there, the plaintiff in this case. A. Yes, sir.

Q. For how long have you known her?

A. A good many years; we resided close together; about three miles apart.

Q. From your earliest recollection you can't remember when she came there? A. No, sir.

Q. Do you know whether or not she was born there?

A. No, sir.

Q. You never learned that?

A. No, sir.

Q. You knew her mother? A. Yes, sir.

Q. What was her mother?

A. Supposed to be an Indian woman.

Q. Half or full blood?

A. She appeared to be a full-blooded Indian.

Q. What language did she speak?

A. German and French part of the time.

Q. She could talk French? A. Yes, sir.

(Testimony of Charles Choliou.)

Q. You saw Sofia, her husband?

A. I just remember him.

Q. Do you remember of her marrying him or not?

A. I don't know that they were married, but I heard they were married.

Q. How far back can you remember her—what is your earliest recollection?

A. I must have been nine or ten years old when I remember these people; that would be in about 1855 or 1856. Somewheres along in there.

Q. If she had any other father except Sofia you never knew him?

A. I heard she had another father by the name of "Tom."

Q. Do you know how long Tom lived in that neighborhood?

A. No, sir; I don't know; I didn't know him.

Q. I will ask you whether or not you know anything about the roll of the Indians for allotment being made up on the Umatilla Reservation.

A. I know something about it.

Q. Tell the Court what you remember as to how that was done; how they got the names to be allotted.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled by the special examiner.)

A. They called a meeting there for all those interested in relation to these three tribes.

Q. What three tribes?

(Testimony of Charles Choliou.)

A. Walla Walla, Cayuse, and Umatillas.

Q. What was done at the meeting?

A. We had to prove whether we belonged here or not before they took the names.

Q. What was done there as to making up the roll as to full-bloods or half-bloods that were entitled to an allotment, making up the lists?

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled. Tell what was done.)

A. We had to be either Walla Walla, Cayuse, or Umatillas. They called them all in and put their names on the list to see how many there were that was entitled to land.

Q. State whether or not the object of that meeting was to find out every person who was entitled to an allotment and report it up to the commissioners.

(Same objection by the plaintiff's counsel. Same ruling by the Court.)

A. Because they didn't want everybody to come in who had mixed blood in them and take up the land.

Q. What was the object—to get all the people in who were entitled to land? A. Yes, sir.

Q. Are you acquainted with this southeast quarter of section 20, township 3 north, of range 34 east of the Willamette meridian, that Hy-yu-tse-mil-kin claims, the plaintiff in this case? A. Yes, sir.

Q. Do you know anything about the improvements that were put on there by Smith?

(Testimony of Charles Choliou.)

A. Not particularly, but I saw the improvements on the place.

Q. Describe them.

A. There are two log barns and a little log cabin and a well, and a fence around the quarter section.

Q. Was the fence around that quarter section or the large tract of land that would also enclose them?

A. Around that quarter section.

Q. How much land did Smith have fenced up there?

A. I could not say.

Q. More than six hundred and forty acres?

A. I don't think he did.

Q. Did he have any other land fenced up there besides what he claimed as an allotment for himself and children? A. I don't think he did.

Q. How much is the value of those improvements, this little log barn and the granary and well?

A. That is pretty hard to tell.

Q. How much would it cost to build them? You are a pretty practical man?

A. I was called in by Harper to help appraise the property; when I got there there was nothing more said about it, and I quit them.

Q. Who was along at that time?

A. Mr. Brisbo and the clerk, John Gyer.

Q. And Harper and Smith?

A. Yes, sir.

Q. What did they do?

A. That is more than I could say.

(Testimony of Charles Choliou.)

Q. What did you do?

A. Not much of anything; they went inside and I stood out of doors.

Q. When they came out what was said?

A. They were wondering what it cost to bring them logs off the mountain. They never asked me any more questions about it, so I had nothing to say.

Q. Did you make up your mind what it was worth?

A. No, sir.

Q. Could you say at this time what it would be worth —a fair price?

A. It is a pretty hard thing to do.

Q. Give your judgment.

A. About $75 for each one.

Q. The two buildings $150? A. Yes, sir.

Q. What are cedar posts worth there?

A. The posts they used were worth about $5 per hundred. That is what I paid for posts.

Q. What do you say the well was worth—do you know who dug that?

A. I know just what I heard; I never see anyone working there at the well myself.

Q. What would you say it was worth—what would it cost to put a well down like it?

A. It depends altogether on what kind of ground you get in. Sometimes it costs a whole lot. Mine cost $4 per foot.

Q. This well is forty-seven feet deep, I believe—what would you say it was worth per foot?

A. I would say $4 per foot.

(Testimony of Albert Minthorn.)

By the COURT.—Is your well through rock?

A. Yes, sir, about the same kind of rock.

ALBERT MINTHORN, called as a witness on the part of the defendant being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. You are a Walla Walla Indian? A. Cayuse.

Q. You are living as an allottee upon the reservation?

A. Yes, sir.

Q. How long have you lived here?

A. All my life except when I went out of the State to school back east.

Q. Do you know how old you are?

A. Yes, sir; thirty-one years.

Q. Do you know Hy-yu-tse-mil-kin?

A. Yes, sir.

Q. And Mr. Smith?

A. Yes, sir; for the last few years.

Q. Do you know anything about this land that Hy-yu-tse-mil-kin claims? A. Yes, sir.

Q. Do you know anything about the improvements there?

A. Hardly; I only passed there one time; that is all.

Q. Do you know anything about what they are worth?

A. I noticed she had a house and shed and a little cabin; I just glanced at it, that is all, from the road.

Q. Was you present to know anything about when Hy-yu-tse-mil-kin was allotted? A. Yes, sir.

(Testimony of Albert Minthorn.)

Q. How much was there?

A. The strip would be about three sections.

Q. Something like one thousand eight hundred acres; did they have it fenced?

A. No, sir; only this side of Adams; they run a furrow around three sections and enclosed it that way.

Q. This was before the allotment? A. Yes, sir.

Q. When the commissioners came to allot the land they allotted Hy-yu-tse-mil-kin inside of that furrow?

A. Yes, sir.

Q. You were acting as interpreter?

A. Yes, sir.

Q. Did anyone go before them at that time and claim it?

A. No, sir; not before any of them Indian men were there.

Cross-Examination.

(By Mr. SLATER.)

Q. Did you run that furrow?

A. No, sir; I did not.

Q. Did you see it run?

A. Yes, sir; I saw it after it was done.

Q. You didn't see it done? A. No, sir.

Q. How do you know who did it?

A. Because they told me.

(Plaintiff's counsel moves the Court to strike out the testimony of the witness in regard to the furrow as hearsay.)

(Testimony of Albert Minthorn.)

By the COURT.—Who told you?

Q. Smith didn't tell you? A. No, sir.

Q. Do you know whether or not Smith was claiming this land inside of this furrow?

A. Yes, sir; it was inside of that.

Q. Was there buildings inside of that; the house and things—were they inside of the furrow?

A. I think it was.

By the COURT.—The motion, so far as it relates that Smith run the furrow, is allowed. So far as it shows the furrow was there and that Mrs. Smith and her family claimed the land inside of it, is allowed to stand, and overruled.

(Motion is withdrawn by plaintiff's counsel.)

Q. Were you present when Hy-yu-tse-mil-kin selected with the allotting commissioners this land?

A. Yes, sir.

Q. Were you the interpreter for the allotting commissioners? A. No, sir.

Q. You don't know whether anybody made application for this land prior to that time?

A. Mr. Smith and family made application for the land but the Indians would not acknowledge them.

Q. Was that the reason Smith and family left the ground because the Indians would not recognize them at that time? A. Yes, sir.

Q. How do you know they didn't recognize them?

A. Because we had a council with them there at the agency.

(Testimony of Albert Minthorn.)

Q. Do you know what recognition they gave them before that?

A. His wife claimed she was a Walla Walla Indian.

Redirect Examination.

Q. You say they had a council at the time the allotting was made and they refused to allot her?

A. Yes, sir.

Recross-Examination.

Q. Didn't they recognize her rights at a later council, in 1887?

A. Yes, sir. They didn't recognize her at that time; I was interpreter with the other boys; we was listening as interpreters; it was not passed upon at that time.

Q. Were you there all the time? A. Yes, sir.

Q. Knew everything that took place? A. Yes, sir.

Q. Knew everything about it? A. Yes, sir.

HY-YU-TSE-MIL-KIN, the defendant, called and sworn as a witness, testified as follows—by Minthorn, interpreter.

Direct Examination.

(By Mr. HALL.)

Q. Where do you live? A. Up the river.

Q. On the Umatilla Reservation?

A. Yes, sir.

Q. What tribe of Indians do you belong to?

A. Cayuse.

Q. How long have you lived on the reservation?

A. Ever since he was a boy.

(Testimony of Hy-yu-tse-mil-kin.)

Q. How old are you? A. Forty-five years old.

Q. Do you know Mrs. Smith—Philomme Smith?

A. No, sir.

Q. This woman sitting back here. (Indicating the plaintiff.) A. He says he don't know her.

Q. Were you at the council of the Indians held on the Umatilla Indian Reservation to see what Indians were entitled to allotment? A. Yes, sir.

Q. Was this woman sitting here (Mrs. Philomme Smith) recognized there as an Indian entitled to an allotment on the Umatilla Reservation?

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant and leading. Objection overruled by the Court.)

A. No, sir. This woman was not there; she came after that meeting was held.

Q. Ask him if he was at another meeting held about the time that the allotments were made—another council with the Indians.

A. He was there at the second meeting.

Q. Ask him if Mrs. Smith was recognized as a Walla Walla Indian and entitled to an allotment at that meeting or any other meeting that he knows anything about.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant, as it does not tend to show that the plaintiff was present. Objection overruled by the Court.)

A. He was at every meeting and he don't recollect of her being there.

(Testimony of Hy-yu-tse-mil-kin.)

Q. Was she ever recognized as a member of the tribe?

A. No, sir.

Q. Were you allotted some land that this man Smith had fenced up in the southeast quarter of section 20?

A. He says he was allotted land up there by the commissioners.

Q. Ask him what, if anything, was on the land, such as houses, barns, etc.

A. He says there were no improvements there.

Q. Ask him if there wasn't a cabin there of some kind.

A. No, sir.

Q. What became of them?

A. There was no house or cabin at the time of the allotment.

Q. Was there any log barn there?

A. There was nothing around there at all.

Q. Who selected this land?

A. He did; this man did; one hundred and sixty acres.

Q. Did you ever build any barn—log barn on there?

A. No, sir.

Q. Isn't there any on it now?

A. There is a stable there now.

Q. Who built it? A. He don't know.

Q. How much is it worth? A. He can't tell.

Q. How much would he sell it for? Ask him if there wasn't a two-wire fence around the land.

A. No, sir; no fence there.

Q. Did you ever pay any money to anybody for any of these improvements, that stable or well or any improvements on there?

(Testimony of Hy-yu-tse-mil-kin.)

(Objected to as incompetent, immaterial, and irrelevant unless the question is confined to the plaintiff. Objection sustained.)

Q. Did you ever pay any money for these improvements?

(Same objection. Objection overruled.)

A. No, sir.

Cross-Examination.

(By Mr. SLATER.)

Q. Who told you to go and take this land?

A. The allotting commissioners.

Q. Did anybody else tell you to go and take this land before you went to the allotting commissioners?

A. No, sir; nobody told him.

Q. Did you have another piece of land which you claimed for your land before you selected this?

(Objected to by defendant's counsel as incompetent and immaterial. Objection overruled.)

A. No, sir.

Q. Did Mrs. Smith ever have this land that you are claiming under your allotment in her possession?

A. No, sir.

Q. Do you know Gus Russie? A. No, sir.

Q. You don't know Gus Russie? They call him Yusta.

A. Yes, sir.

Q. Ask him if he didn't go with Yusta to this land and break the fence that was around it.

A. He says Yusta told him he would rent the land.

Q. Ask him if he didn't go with Yusta to the land and break the fence? A. No, sir.

CHARLES WILKINS, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALL.)

Q. You are at present the United States Indian agent for the Umatilla Indian Reservation?

A. Yes, sir.

Q. Do you know Philomme Smith and family?

A. I know Mr. Smith and Mrs. Smith by sight—I have met them, yes, sir.

Q. I ask you whether or not they are allotted upon the reservation—Mrs. Smith.

A. Yes, sir; Mrs. Smith is.

Q. What, if any, disposition in the way of renting or otherwise has she made on her land?

A. She has leased a portion of it.

(Objected to by plaintiff's counsel as not the best evidence. Objection overruled.)

Q. What has been their custom since you have been there as to renting it or otherwise from year to year?

A. I have rented it for Mrs. Smith; I made the last lease on it; previous to that time I don't know.

Q. To whom is the lease money paid?

A. It was paid to me.

Q. For whose use and benefit?

A. For Mrs. Smith.

Q. What is the fact as to whether or not she has accepted it from time to time?

A. She came with Mr. Smith, I believe, and accepted it.

(Testimony of Charles Wilkins.)

By Mr. HALL.—Counsel on behalf of the Government offers in evidence in support of the issues maintained by defendant a certified copy of United States Indian Agent Harper's report, dated August 17th, 1894, pertaining to improvements made by Philomme Smith on the south-east quarter of section 20, township 3, range 34 east. Umatilla Indian Reservation; also a list of the allotments made to her and her children thereon by United States Indian Agent Wilkins on November 24th, 1899, the same being duly certified to by W. A. Jones, Commissioner of Indian Affairs, Washington, D. C.

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant, and especially to that part of it applying to the allotments from Philomme Smith and her children, for the reason that the same does not show that said allotments were made upon the selection of Philomme Smith. Objection overruled.)

Q. You did not allot these lands?

A. No, sir; I didn't make the selections.

Q. They were by your predecessor?

A. Yes, sir.

Q. I ask you whether or not Mrs. Smith has been exercising control over these lands during the incumbency of your office. A. Yes, sir; she has.

Cross-Examination.

(By Mr. SLATER.)

Q. You say she has been exercising control; what do you mean?

A. She leased the land to Mr. Snyder.

(Testimony of Charles Wilkins.)

Q. Has she ever had possession?

A. I suppose so; it was allotted to her and she leased it to Mr. Snyder. If I mistake not she told me she had received the money for the lands but had not received enough, previous to my making this lease.

Q. That is all, unless you know something else which you would like to state.

A. I know Mrs. Smith made the selections, or rather Mr. Smith made the selections and changed from one place to another.

Cross-Examination.

(By Mr. SLATER.)

Q. You don't know that of your own personal knowledge? A. No, sir.

(Plaintiff moves to strike out that part of the testimony. Motion allowed by the Court.)

Defendant's counsel here states that he rests his case.

PHILOMME SMITH, the plaintiff, recalled in rebuttal, testified—By Mr. Brisbo, interpreter as before.

Direct Examination.

(By Mr. SLATER.)

Q. Did you ever select any other land upon the reservation for your allotment?

A. No, sir; she never selected any for herself.

Cross-Examination.

(By Mr. HALL.)

Q. How did you get this land you are renting to Snyder?

(Testimony of Philomme Smith.)

A. The old man must have done it; she knows nothing about it.

Q. Who do you mean by old man?

A. Mr. Smith.

Q. Did Mr. Smith have any right to make any selection for you?

(Objected to by plaintiff's counsel as incompetent, immaterial, and irrelevant. Objection overruled by the Court.)

A. She never authorized him to do it.

Q. You rented the land and accepted the money, though?

A. Yes, sir; she went there and got the money on it.

Q. You signed the lease, too, didn't you?

A. Yes, sir; she signed the lease all right.

Q. You knew what you were signing?

A. She said she didn't know very much what she signed, but she signed it all the same.

Q. You knew you were leasing this land, this new allotment, didn't you? A. Yes, sir.

Q. You knew how much an acre you were getting for it?

A. She says she didn't know how much an acre.

Q. Who did make the bargain?

A. Old man Smith.

Q. Ask her if she didn't get the money.

A. She drew the money once herself.

(Testimony of Philomme Smith.)

Redirect Examination.

Q. Ask her if she knew she was giving up or intended to give up her first land.

A. No, sir; she had no intention of dropping it. She didn't intend to let it go.

Plaintiff here rested her case.

State of Oregon,
County of Umatilla. } ss.

I, J. S. Beckwith, being first duly sworn, say: That I took the foregoing testimony down in shorthand at the trial of said cause, and afterwards transcribed the same into typewriting, and that the foregoing pages of typewriting contain a full, true, and correct transcript of the testimony so taken, and all the testimony given at the trial thereof.

J. S. BECKWITH.

Subscribed and sworn to before me this 28th day of August, 1900.

[Seal] CHAS. H. CARTER,
Notary Public for Oregon.

Filed September 10, 1900. J. A. Sladen, Clerk.

Plaintiff's Exhibit "A."

DEPARTMENT OF THE INTERIOR.

C. F. L.

Office of Indian Affairs.

Washington, October 2, 1896.

I, D. M. Browning, Commissioner of Indian Affairs, do

hereby certify that the papers hereto attached are true copies of the originals as the same appear on file and of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[Seal] D. M. BROWNING,
Commissioner.

E. E. W.

DEPARTMENT OF THE INTERIOR.

Washington, September 24, 1896.

The Commissioner of Indian Affairs.

Sir: Referring to Department letter of the 20th of last July, in the matter of the application of Mrs. Philomme Smith and others and Mrs. Louisa Morrisette and others for the allotment of certain land in the Umatilla Reservation, Oregon, which had been allotted to other parties, directing an investigation by your office of the dates when the allottees acquired their alleged right to take the particular tracts of land allotted to them, the value of any improvements made thereon by them, and the dates thereof, etc., and to your report of the investigation made, dated the 19th instant, I now transmit, for your information an opinion of the Assistant Attorney General for the Department, dated August 6th last, favorable to the applicants, which has received the approval of the secretary.

He suggests, however, in view of the fact that the showing by the applicants is an ex parte one, that the allottees be called upon to show cause why the allotments should

not be canceled and the petitioners allowed to have allotment of the tracts, as their various interests appear.

In accordance with the foregoing suggestion, you will notify the allottees in question, and cite them before your office to show cause why the allotments made to them should not be canceled and the same lands allotted to the petitioners, according to their various interests, giving the allottees ample time to prepare their cases.

All the papers in the case are transmitted for file in your office.

Very respectfully,

WM. H. SIMS,
Acting Secretary.

6130 Ind. Div. '95. 1 pkg. papers.

DEPARTMENT OF THE INTERIOR.
Office of the Assistant Attorney General.
Washington, August 6, 1896.

The Honorable, The Secretary of the Interior.

Sir: I am in receipt of your communication of July 20, 1896, asking for an expression of opinion in the matter of the applications of Philomme Smith et al. and Louisa Marsette or Morisette et al. for allotments in the Umatilla Reservation.

An examination of the records shows that on July 1, 1893, my predecessor delivered an opinion upon the rights of these parties in which he held that they were not so entitled. The question being reviewed by him on June 28, 1895, he rendered an opinion in which he recommended that the opinion theretofore rendered by him should not be followed, and that the applicants in the case were entitled to such allotments.

In a letter of the Honorable Commissioner of the Indian Office of October 30, 1895, the lands involved, with their present condition, are set out to be as follows:

That Mrs. Philomme Smith claims for herself the S. E. ¼ of Sec. 20, T. 3 N., R. 34 E., Oregon; that this tract was allotted to Hy-yu-tse-mil-kin, which allotment was approved by the Department, April 12, 1893, and leased by the approval of the Department for two years from March 1, 1894.

The NE. ¼ of the NE. ¼ of Sec. 29, of said township and range is claimed for Charles Smith, minor child of Mrs. Smith; the NW. ¼ of the NE. ¼ of said section, township and range is claimed for Maggie Smith, minor child of Mrs. Smith; the SE. ¼ of the NE. ¼ of said section, township and range is claimed for Jennie Smith, minor child of said Mrs. Smith; the SW. ¼ of the NE. ¼ of said section, township and range is claimed for Lura Smith, minor child of said Mrs. Smith. All these lands have been allotted to Martha Hebeart, a Walla Walla Indian, and the allotment was approved on April 12, 1893.

The NE. ¼ of the NW. ¼ of Sec. 29, of said township and range, is claimed for George Smith, minor child of Mrs. Smith; the SE. ¼ of the NE. ¼ of said section, township and range is claimed for Soffa Smith, minor child of said Mrs. Smith; and the W. ½ of the NW. ¼ of said section, township and range is claimed for James Smith, over eighteen years of age, son of Mrs. Smith. These lands have been allotted to Margaret Bourner, a Walla Walla Indian, and the allotment was approved by the Department April 12, 1893. They were leased for two

years from November 1, 1894, and the lease was approved by the Department.

The W. ½ of the SE. ¼ of Sec. 29, said township and range, is claimed for William Smith, over eighteen years of age, son of Mrs. Smith; the NW. ¼ of said SE. ¼ has been allotted to Mary B. Guyott, minor child of Mary Guyott, and the SW. ¼ of the SE. ¼ has been allotted to Carrie Chalifoe, minor child of Julia Ann Chalifoe. The NW. ¼ of the SE. ¼ above mentioned has been leased for a period of three years from March 1, 1894, and approved by the Department.

Mrs. Morisette, now dead, claims for herself the NE. ¼ of Sec. 14, T. 3 N., R. 3 E. This tract has been allotted to Charles McWhirk, and the allotment was approved by the Department April 12, 1893; the E. ½ of the SE. ¼ of Sec. 29, and the E ½ of the NE. ¼ of Sec. 32, said township and range, is claimed for Mrs. Mary Pecar, over eighteen years of age, a daughter of Mrs. Morisette. These lands were allotted to Mary Guyott and the allotment approved by the Department April 12, 1893. They have been leased for a period of three years, beginning March 1, 1894, and the lease approved by the Department.

The SW. ¼ of the NE. ¼ of Sec. 32, said township and range, is claimed for Ang Meshee, minor child of Mrs. Mary Pecar, and grand-daughter of Mrs. Morisette; the NW. ¼ of the NE. ¼ of said section 32, said township and range, is claimed for John Meshee, minor child of Mrs. Mary Pecar. These lands were allotted to Louis Chalifoe and the allotment approved by the Department April 12, 1893.

The questions for disposition are: (1) Are these par-

ties, the applicants here, entitled to allotment in the Umatilla Reservation (diminished)?; (2) Are they entitled to the tracts which they have applied for, and, as a corollary of this proposition, has the Department authority to cancel the allotments heretofore made and make new allotments for the various tracts involved by the petition?

The allotment act of March 3, 1885 (23 Stats. 340), provides: That the President of the United States cause lands to be allotted to the confederated bands of Cayuse, Walla Walla, and Umatilla Indians, residing upon the Umatilla Reservation, in the State of Oregon.

Said act also provides that: Before any allotments are made, a commission of three disinterested persons to be appointed by the President shall go upon said reservation and ascertain as near as may be the number of Indians who will remain on said reservation, and who shall be entitled to take lands in severalty thereon. * * * * Said commission shall report to the Secretary of the Interior the number and classes of persons entitled to allotments, as near as they may be able to.

And it appears further that the manner of making allotments was to be as follows: Allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon the selections made by the head of the family.

By the act of June 9, 1855 (12 Stats. 945), which was a treaty between these bands of Indians and the Federal Government, in which these confederated tribes ceded all of their rights to the large area of country occupied by

them and took in lieu thereof a reservation set aside exclusively for their use, it was provided:

The said tribes and bands agree to remove to and settle upon the same (the permanent reservation) within one year after the ratification of this treaty, without any additional expense to the Government other than is provided by this treaty, and until the expiration of the time specified the said bands shall be permitted to occupy and reside upon the tracts now possessed by them.

Under the authority of this act and the opening paragraph of the act of 1885 (supra), my predecessor, in his first opinion, held that it was the intent of Congress in the act of 1885, the one now under consideration, to provide for allotments for only those who resided upon the permanent Umatilla reservation. Subsequently, in his opinion rendered on June 28, 1895, he concluded that he had attached too much importance to the opening paragraph of the act of 1885, and that while it was agreed in the treaty of 1855 that the Indians should remove within one year to the permanent reservation, that there was no penalty affixed to its violation, and that a failure to so remove and reside would not work a forfeiture of their tribal rights.

It is in evidence that Mrs. Smith and Mrs. Morisette are full-blooded Indians, their mother having been a Walla Walla, who married an Iroquois. They were not residing upon this reservation at the time that the act of 1885 became operative, nor, for that matter, were the majority of Indians belonging to these confederated tribes. It is shown by the record that when the agents of the Government went on this reservation they found

but few Indians actually residing there, and it was only after two weeks of sending out of runners and the using of all the means at their disposal that they succeeded in securing an attendance of a majority of the male adults of these tribes. This was in itself a recognition by the Department that residence upon the reservation was not essential to tribal recognition.

In the treaty of 1855 it was provided that so much of the territory of these Indians within the States of Oregon and Washington in which they had been accustomed to roam over, hunt, fish and pasture their stock, as was not settled upon or claimed for individual use by citizens of the United States, should be, in common with such citizens, at the disposal of these Indians, and in accordance with such right so granted these petitioners, with their husbands, who are white men, moved off of the permanent reservation and upon the land to which they had a common right of usage with others. The trouble with these claimants seems to have arisen out of their failure to be upon the reservation when the census roll of the tribe was made up. They arrived at said reservation, in reply to the communication sent to them by one of the Indians, the day after the census takers had left the reservation, to wit, on the 7th day of June, 1887; or rather Mrs. Morisette arrived upon that day and Mrs. Smith shortly thereafter. They were recognized by Homily, chief of the Walla Wallas, and various other head men and members of the confederated tribes, and the Indian agent then in charge assigned each one of them to a parcel of land, after selection, and they have made valuable improvements on and have continued to reside thereon,

as far as this record shows, ever since—the value of their improvements amounting to a considerable sum. They began residence upon the land about the middle of June, and their reasons for not having arrived sooner was that they lived some two hundred miles away and were without money to make the trip.

It appears from the record, further, that a council was held about 1890 in which their right to allotments was recognized. About a year thereafter such right was denied. My conclusions are that the action of the council in recognizing or in refusing to recognize these applicants can be of no weight. They were either members of the confederated tribes, in this instance Walla Walla, or they were not. The right of determining this question, under the wording of the statute, it is clear, resides with the Secretary of the Interior. The fact that they did not reside on the reservation is likewise immaterial, in view of the property right granted them under the treaty of 1855, of occupancy in common with others of any of the lands theretofore occupied by them that were not claimed by private individuals.

It appears, further, that inheritance among these Indians is through the mother and not through the father, and that the true test in these cases is to ascertain whether parties claiming to be Indians and entitled to allotments have by their conduct expatriated themselves or changed their citizenship. In this connection it is proper to state, in view of what the record shows, that *they never been outside* of the hunting and fishing grounds of their tribe, and that their conduct in failing

to stay upon this reservation cannot be construed as working a forfeiture of their rights, inasmuch as a large percentage of allottees upon this reservation resided, as did these petitioners, elsewhere than upon the reservation. I am, therefore, of the opinion that they are entitled to such allotments.

In reference to the question whether they are entitled to the tracts selected by them, in view of the allotments heretofore made, it appears proper to state that they, in the showing made in this record, which is an ex parte showing, outside of an official record, in accordance with the language of the statute (supra) selected these tracts of land with the consent of and notice to the head chief of the tribe and the then Indian agent, and went into peaceable possession of them, and have placed valuable improvements thereon; and that the allottees received allotments of these lands with knowledge of these facts. Nor can it be said that the first opinion of my predecessor, which was approved by you, was in anywise the cause of the making of such allotments, inasmuch as it appears from the record that they were made on April 12, 1893, and the opinion in question was not rendered until July 1, 1893.

If this showing is to be the only one, I am of opinion that they are entitled to the tracts applied for by them. But I would suggest, in view of the fact, that the showing is an ex parte one, that the allottee be called upon to show cause why the allotments should not be canceled

and these petitioners allowed to have allotments of these tracts as their various interests appear.

All of which is respectfully submitted.

WM. A. LITTLE,
Assistant Attorney General.

Approved:
HOKE SMITH,
Secretary.

Filed September 10, 1900. J. A. Sladen, Clerk.

Defendant's Exhibit No. 1.

DEPARTMENT OF THE INTERIOR,
C. F. L.
Office of Indian Affairs.
Washington, April 11, 1900.

I, W. A. Jones, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of so much of the originals to which they relate, viz: That part of United States Indian Agent Harper's report dated August 17, 1894, pertaining to improvements made by Philomme Smith on SE. ¼, Sec. 20, T. 3 N., R. 34 E., Umatilla Indian Reservation, Oregon, and schedule of allotments made to her and her children thereon, by United States Indian Agent Wilkins on November 24, 1899, transmitted to this office by his letter of November 25, 1899, as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[Seal, Office of Indian Affairs] W. A. JONES,
Commissioner,
N. C. T.

UNITED STATES INDIAN SERVICE.

Land.

48,162-1893.

Umatilla Agency, August 17, 1894.

Honorable Commissioner of Indian Affairs, Washington, D. C.

Sir: In reply to your letter of January 19, 1894, reference above, I have the honor to submit the following:

I visited the lands alleged to have been improved and claimed by Mrs. Philomen Smith and Mrs. Louise Morrisette, respectively, and secured all the evidence obtainable, which can be summarized as follows:

The lands claimed by Mrs. Philomen Smith for herself and family: SE. ¼ Sec. 20, T. 3 N., R. 34 E., upon this land she constructed, or had constructed, one and one-half miles of fencing, granary, barn and a well dug. The present value of these improvements do not exceed $225.00. No crop has been raised on this land, but has been used one year by Mrs. Smith for depasturing her stock.

Allotted to Hy-yu-tse-mil-kin.

* * * * * * * *

Respectfully,

GEORGE W. HARPER,

United States Indian Agent.

Walla Walla.

No. of Allotment.	Name of Allottee. Indian.	English.	Male	Female	Age	Subdivision.	Section	Town.	Range	Acres	100ths	Remarks
462	Phi-lo-mene	Smith		F	53	Lots 13 and 14, Sec. 36, Tp. 3 N., R. 33 Lot 3 of Sec. 5, Tp. 2 and S. W. ¼ of N. W. ¼	33	3	34	146	20	Head
463		James Smith	M		26	N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼	25	2	33	80		Son
464		Charles "	"		10	N. W. ¼ of S. W. ¼	33	3	34	40		"
465		Jane "		F	12	Lot No. 1	32	3	34	38	10	Daughter.
466		Maggie "		"	16	S. E. ¼ of N. E. ¼	5	2	34	40		"
467		Laura "		"	7	S. E. ¼ of N. W. ¼	5	2	34	40		"

Umatilla Agency, Oregon, Nov. 24, '99.

I, the undersigned do hereby certify, on honor, that the above is a true schedule of allotments as made by me under authority from the United States Commissioner.

CHARLES WILKINS,
United States Indian Agent.

Filed September 10, 1900. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 1st day of March, 1901, there was duly filed in said court testimony taken before Charles H. Carter, special examiner, accompanying supplemental findings, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant

Testimony Accompanying Supplemental Findings.

Testimony of Susanne Gagnon, and others, taken before Chas. H. Carter, special examiner in the above suit, at his office, at 1:30 P. M., on the 19th day of January, 1901, pursuant to notice duly given to the parties to the said suit, through their respective counsel:

At the time and place aforesaid plaintiff appeared in person and by R. J. Slater, Esq., her counsel, and the defendant appearing not; he, however, through the Honorable John H. Hall, District Attorney, having on yesterday, by telegram, requested a postponement of this cause for one week, which request for postponement was denied and is now here again denied; and he was then informed that the examination would take place at this time and place, and he, over the telephone from Portland, Oregon, consented thereto.

SUSANNE GAGNON, a witness on behalf of plaintiff, being first duly sworn, testified as follows, through Mr. Frederick Parr, interpreter, who was also duly sworn, as the law directs.

(By Mr. SLATER.)

Q. Where do you live?

A. About two miles on this side of Spring Hollow.

Q. On the Umatilla Reservation? A. Yes, sir.

Q. How long have you lived on the Umatilla Indian Reservation?

A. Since they moved us here, since they moved the Indians here.

Q. Are you a full-blood Indian woman?

A. Yes, I am a full-blooded Indian.

Q. To what tribe of Indians do you belong?

A. The old Wallula Indians, the Walla Wallas.

Q. How long have you lived in this country?

A. I don't know exactly; we never keep track of our age. I am about sixty years old.

Q. Have you lived in this country all your life?

A. Yes, just from Wallula to Walla Walla and here.

Q. Do you know Mrs. Philomme Smith?

A. If that is the Mrs. Smith, yes.

Q. How long have you known her?

A I knowed her at the time that that doctor was killed, Dr. Whitman was killed.

Q. Where was she (Mrs. Smith) then?

A. Over there at Walla Walla.

Q. Did you know Mrs. Smith's mother?

A. Yes, she was there with her mother.

(Testimony of Susanne Gagnon.)

Q. Was her mother an Indian woman?

A. Yes, she was a full-blood Indian.

Q. Of what tribe or tribes did she belong?

A. Wallula or Walla Walla.

Q. Did you know Mrs. Smith and her mother before that doctor was killed?

A. I knowed of them, but I had not seen them at that time; they were down below; her grandmother used to tell me about her father, her mother's father.

Q. Did you know Mrs. Smith's father? A. Yes.

Q. Was he a white man or an Indian?

A. He was an Indian from another tribe—from the Black Feet.

Q. How old were you when the doctor was killed?

A. In the neighborhood of nineteen years old.

Q. How old was Mrs. Smith when you saw her at Wallula after that?

A. She was small, just about that size (indicating about three feet).

Q. Did you know any of Mrs. Smith's brothers and sisters?

A. Yes, she had a sister about so high (indicates); then she had one—and a little brother that was younger than her.

(By Mr. CARTER.)

Q. What was Mrs. Smith's mother's name?

A. Don't remember what her name was. I was pretty small when they left and I don't recollect.

Q. What was Mrs. Smith's father's name?

(Testimony of Philomme Smith.)

A. Thomas.

Q. Was he a Blackfoot or an Iroquois?

A. Iroquois.

Q. None of these other tribes that she names?

A. No.

Mrs. PHILOMME SMITH, the plaintiff, having been heretofore duly sworn in this cause, testifies as follows:

(By Mr. SLATER.)

Q. Mrs. Smith, it has been shown by the defense that you have been allotted another piece of land; do you intend to hold both pieces of land?

A. No, I want the first one I took.

Q. When you selected, or had this second piece selected for you, did you intend to give up your claim to the other land that you had selected?

A. No, I didn't want to give it up if I could keep my first piece.

Mr. F. A. SMITH, the husband of the plaintiff, having been heretofore duly sworn, is again called as witness in plaintiff's behalf, and testifies as follows:

(By Mr. SLATER.)

Q. Mr. Smith, when you and your wife were called upon by the agent, Mr. G. W. Harper, to give up the land that your wife had selected, and to select another piece of land, state what, if any, conversation you had with the agent about that.

A. I went to the agent a couple of days after—a few days afterward, any way, and I asked him if it would

(Testimony of Mr. F. A. Smith.)

have any effect on our fighting this cause if we had to take other lands, and he said he didn't think it would; he thought we could go on and fight this case just the same and select some other piece of land. I told him we could select other land, but I would fight this piece as long as there is any land there.

Q. State, as near as you can, when it was that you enclosed this land that your wife is claiming with a fence.

A. I think it was—I am positive in the spring of 1890.

Q. What kind of fence was it?

A. Two-wire fence. In 1889 I put the barn on there and in the spring of 1890 I put the fence there.

(By Mr. CARTER.)

Q. You have mentioned having had a conversation with the agent about selecting other land than the piece in question; who was present when you had that conversation, besides yourself and the agent?

A. I don't remember; my wife was there, my wife and I both.

Q. Anyone else besides you three?

A. I don't remember now as there was.

Q. Where was it?

A. It was at the agency. He went on and said, "You had better go on and take it; you won't know the difference in a hundred years from now," and I said, "No, I don't suppose I would, but some of my children or their children might."

(Testimony of Mr. F. A. Smith.)

Q. How long was this before you made the second selection?

A. Oh, it was quite a while; in a few days, though, I made the selection of one 40, the one we had a little house built on; there was a little house down there that we built and afterward we found that it was vacant land. We just moved down and lived there.

Q. You had no other place to go, did you?

A. No.

ED BRISBO, being heretofore duly sworn in this cause, was again called as a witness in plaintiff's behalf, and testified as follows:

(By Mr. SLATER.)

Q. Mr. Brisbo, you are acquainted with the land that Mrs. Smith is claiming and trying to get in this cause, are you not?

A. Yes, I guess I ought to be by this time.

Q. Were you acquainted with it at the time that the allotments were made? A. Yes, sir.

Q. Do you know whether it was fenced at that time or not? A. When the allotment was made?

Q. Yes.

A. Well, I don't recollect—yes, come to think of it, we had to break into it.

Q. Who cut through the fence?

A. Some of Gus Russie's men.

Q. Were you present when it was done?

A. Yes, I helped to go in through the fence myself.

(Testimony of Ed Brisbo.)

(By Mr. CARTER.)

Q. Who was there besides yourself and this Gus Russie man?

A. There was a man named Dave Dorian, Boston Murry and Alore, and Rube Wilson and myself; there were five of us.

Q. When was this—after the allotment or before the allotment? A. Just right after the allotment.

Q. Right after the allotment was made to Hy-yu-tse-mil-kin? A. Yes, sir.

Witness excused.

Pursuant to stipulation entered into between counsel for the respective parties above named at a former taking of depositions in this cause, to the effect that the witnesses might sign the stenographer's notes and need not sign the testimony after the same should be transcribed into longhand, the witnesses now here are allowed, each in the presence of the stenographer, to sign the stenographer's notes to their deposition.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Certificate of Special Examiner.

United States of America,
District and State of Oregon, } ss.
Umatilla County.

This certifies that the above cause came on for hearing before the undersigned, Chas. H. Carter, special examiner, at his office in the Pendleton Savings Bank Building, in Pendleton, Oregon, at 1:30 P. M. on January 19, 1901, pursuant to notice given to each party and to their respective counsel heretofore, plaintiff being present in person and by R. J. Slater, Esq., her counsel, and defendant not being present.

And thereupon the following witnesses were introduced by plaintiff, duly sworn and gave testimony as shown by the papers attached hereto, to wit: Susanne Gagnon, Philomme Smith, the plaintiff, F. A. Smith, husband of plaintiff, and Ed. Brisbow; thereupon the cause was adjourned until Saturday, January 26, 1901, at the same place, at 10 o'clock in the forenoon, at the request of counsel for defendant, by telegram.

And at 10 o'clock in the forenoon on January 26, 1901, there being present, at the time and place aforesaid, Chas. H. Carter, special examiner, R. J. Slater, counsel for plaintiff, and no other person appearing, the taking of depositions was thereupon declared closed.

That before proceeding to the examination of the witnesses above mentioned each of them was sworn by the undersigned, as special examiner, to tell the truth, the whole truth, and nothing but the truth; that their testimony was then read over to each of them after it was given, and they each approved of the same, and in token thereof signed the original stenographic notes of said testimony.

Dated at Pendleton, Oregon, this 26th day of February, 1901.

CHAS. H. CARTER.
Special Examiner.

Filed March 1, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And to wit, on the 24th day of November, 1900, there was duly filed in said court the deposition of G. W. Harper, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

Commission for Taking Deposition of G. W. Harper.

The President of the United States of America, to James W. Marshall, United States Commissioner, Spokane, Washington, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you full power and authority diligently to examine G. W. Harper, upon his corporal oath, or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereto annexed, as a witness on the part of the defendant, in a certain cause now pending undetermined in the Circuit Court of the United States of America for the District of Oregon, wherein Philomme Smith is plaintiff and Hy-yu-tse-mil-kin is defendant; and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, and direct it to the clerk of the above-entitled court, at Portland, in the District of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at Portland, in said District, this the 14th day of November, A. D. 1900.

[Seal of the U. S. Circuit Court, District of Oregon.]

J. A. SLADEN,
Clerk.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Interrogatories to be Propounded to G. W. Harper:

Interrogatory 1. State your name, age, residence and occupation.

Interrogatory 2. State what official position you held upon the Umatilla Indian Reservation in the State of Oregon, and during what time.

Interrogatory 3. While you were such officer, were you acquainted with the plaintiff, Philomme Smith?

Interrogatory 4. Where did she reside?

Interrogatory 5. Do you remember the description of the tract of land upon which she resided and that which she claimed as her allotment?

Interrogatory 6. Did you know the defendant, Hy-yu-tse-mil-kin?

Interrogatory 7. Did you know the land which was allotted to him?

Interrogatory 8. What claim, if any, did the plaintiff make to that land?

Interrogatory 9. Was she in possession of it?

Interrogatory 10. Did she have any improvements upon it?

Interrogatory 11. State, if you know, how she lost possession of that land.

Interrogatory 12. State what you did in your official capacity to compel her to give up possession of that land.

Interrogatory 13. Did she leave it voluntarily, or was she compelled to leave it, and if so, how and by what authority?

Interrogatory 14. State, if you know, whether Mrs. Smith afterwards selected another tract of land, and if so, why did she do so?

Interrogatory 15. State who, if anyone, talked and acted for Mrs. Smith in this matter.

Interrogatory 16. State what, if anything, was said by Mrs. Smith, or her husband for her, about still holding or claiming her rights to the land which they were compelled to give up to the defendant, at or about the time she was compelled to make her second selection.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH, Plaintiff,

vs.

HY-YU-TSE-MIL-KIN, Defendant.

Cross-Interrogatories to be Propounded to G. W. Harper:

Cross-interrogatory No. 1. State fully the character and value of the improvements upon the tract of land that was awarded to defendant by the allotting commissioner.

Cross-interrogatory No. 2. State whether or not there was any person living upon said tract of land at the time of said allotment.

Cross-interrogatory No. 3. State how much land was allotted subsequently to Philomme Smith, and who selected it.

Cross-interrogatory No. 4. Please state generally anything that you know regarding this case that is pertinent thereto.

Filed November 14, 1900. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Deposition of G. W. Harper.

I, G. W. Harper, of Spokane, Spokane County, State of Washington, being first duly sworn to tell the truth, the whole truth, and nothing but the truth in answer to interrogatories and cross-interrogatories annexed to the foregoing commission, deposes and says as follows:

Direct Examination of G. W. Harper.

To the first interrogatory I answer: My name, G. W. Harper; age, fifty-five years; present or temporary residence, Spokane, Washington; business, lodging-house.

To the second interrogatory I answer: I was Indian agent from January 16th, 1894, to April 1st, 1898.

(Deposition of G. W. Harper.)

To the third interrogatory I answer: I was.

To the fourth interrogatory I answer: She resided upon the reservation.

To the fifth interrogatory I answer: Do not remember the description of the land.

To the sixth interrogatory I answer: Yes.

To the seventh interrogatory I answer: Yes.

To the eighth interrogatory I answer: The plaintiff claimed the land and exercised acts of ownership over it part of the time I was agent—claimed that she rented the land and improved it before it was allotted.

To the ninth interrogatory I answer: Yes, up to a short time before I went out.

To the tenth interrogatory I answer: Yes, it was fenced —stable and barn on it, a well and another house for harness, grain, etc.

To the eleventh interrogatory I answer: I was ordered by Indian commissioner to take police and put Mrs. Smith off the land claimed by Hy-yu-tse-mil-kin. I informed Mrs. Smith of my orders and she said she would go off the land without being forced, but would go under protest, and continue to claim the land.

To the twelfth interrogatory I answer: Nothing but what I stated in interrogatory No. 11.

To the thirteenth interrogatory I answer: She did not leave it voluntarily but by order of the commissioner as detailed in answer 11.

To the fourteenth interrogatory I answer: She left the land, selected another tract. She did so because I, as

(Deposition of G. W. Harper.)

agent, was ordered by Indian commissioner to allot her and children on other land.

To the fifteenth interrogatory I answer: Her husband, Mr. Frank Smith, and herself. She was often with him.

To the sixteenth interrogatory I answer: Before Mrs. and Mr. Smith made a selection they came to my office and asked me if it would affect their rights in the Hy-yu-tse-mil-kin land for them to select land as directed by the commissioner. I told them I did not think it would; that they were acting under orders from an officer and did not do so of their own free will.

Cross-Examination of G. W. Harper.

To the first cross-interrogatory I answer: The improvements were a wire fence around the land, barn and stables, and another house used for harness, grain, etc., and a well. The value of the improvements, considering the time they were made, are worth near ($1500) fifteen hundred dollars; the houses are logs.

To the second cross-interrogatory I answer: I do not know if anyone was.

To the third cross-interrogatory I answer: One hundred and sixty acres to Philomme Smith as head of the family. I do not remember how many children they had and do not know much was allotted to the children. Mr. Smith acted for Philomme Smith in selecting the land.

To the fourth cross-interrogatory I answer: I remember nothing further pertinent to the case.

GEORGE W. HARPER.

State of Washington,
County of Spokane. }

This certifies that I, J. W. Marshall, United States Commissioner for the District of Washington (residing at Spokane), by virtue of the foregoing commission to me directed, caused the above-named G. W. Harper to come before me in Spokane, Spokane County and State of Washington, on the 21st day of November, at Spokane, and that the foregoing deposition was taken before me at Spokane, in said county, on the last day named, between the hours of ten o'clock A. M. and five o'clock P. M. of said day, and the same was by me reduced to writing; that before proceeding to examine the said deponent he was by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in answer to the interrogatories and cross-interrogatories annexed, and thereupon he made the foregoing answers; that the said deposition when completed was read by me to said deponent, and the same was thereupon signed by him in my presence.

In testimony whereof, I have hereunto set my hand and official seal this 22d day of November, 1900.

[Commissioner's Seal] J. W. MARSHALL,
United States Commissioner, District of Washington.

Filed November 24, 1900. J. A. Sladen, Clerk, United States Circuit Court, District of Oregon.

And to wit, on the 1st day of March, 1901, there was duly filed in said court the deposition of J. B. Eddy, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

Deposition of J. B. Eddy.

R. J. SLATER, for Plaintiff.

JOHN H. HALL, as United States Attorney, for the Defendant.

An order having been heretofore made by the Judge of the above-entitled court, directing that the testimony of J. B. Eddy be taken before J. A. Sladen as special United States Commissioner in the above-entitled cause, and reduced to writing, and transmitted to Charles H. Carter, of Pendleton, as special referee in said cause, and the parties appearing by their respective counsel:

J. B. Eddy, after being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. HALL.)

State your name, age, residence, and occupation.

A. J. B. Eddy; forty-six years old; residence, Forest Grove, Oregon; occupation, attorney.

(Deposition of J. B. Eddy.)

Q. Mr. Eddy, you were one of the allotting agents appointed by the President of the United States to allot the lands upon the Umatilla Indian Reservation in severalty to those Indians? A. I was.

Q. I will ask you whether you recall to mind the allotment to the defendant in this case, Hy-yu-tse-mil-kin.

A. I do.

Q. It appears from the record that the said Hy-yu-tse-mil-kin was allotted the southeast quarter of section 20, in township 3 north, range 34 east of the Willamette meridian, containing one hundred and sixty acres of land. I will ask you whether or not Hy-yu-tse-mil-kin selected this particular tract of land as his allotment.

A. He did.

Q. You may state, briefly, the circumstances under which said allotment was made, and the condition of the land.

A. Under our instructions from the Indian office, we were directed that each head of a family should make the selection of land for himself and the members of his family; and out on the prairie it was customary for the Indians, or those claiming lands, to run a furrow around their claim; and when we went to make the allotment to Hy-yu-tse-mil-kin, he went with us to this quarter section in question, and indicated it by the furrow which was plowed around it—said it was his land; and it was so allotted and recorded.

Q. I will ask you whether, prior to that time, Philomme Smith, the plaintiff in this case, had demanded

(Deposition of J. B. Eddy.)

that said land he allotted to her, of the commissioners?

A. No, she had not; not at that time.

Q. Did she make any demand before the allotment to Hy-yu-tse-mil-kin? A. Not that I know of.

Q. Did she make any such demand to you?

A. No.

Q. Or in your presence? A. No.

Q. I will ask you whether or not at that time the allotting commissioners, of which you were one, made any allotment to Philomme Smith or the members of her family. A. No.

Q. For what reason?

A. Because we had been directed by the Commissioner of Indian Affairs not to allot Mrs. Smith or her children lands on the reservation.

Q. Where was Mrs. Smith residing at that time, if you know?

A. Just across on the quarter section immediately south of the quarter section claimed by Hy-yu-tse-mil-kin.

Q. Did she have a residence there—a house?

A. Yes; she had a log house; I am pretty certain it was.

Q. What, if any, improvements were on the land allotted to Hy-yu-tse-mil-kin?

A. I think, with the exception of the furrow that was run around, there was a kind of shed, a little shed of some sort; I think it was on that quarter, but I would not be positive. I am reasonably sure, though, that there was some kind of little fixing that was used as a shed for stock; a small affair.

(Deposition of J. B. Eddy.)

Cross-Examination.

(Questions by Mr. SLATER.)

Q. Are you certain that there was no fence around this quarter section?

A. I am pretty certain there was no fence about it. Of course, it is several years ago; but I am reasonably sure that that quarter section was not fenced.

Q. Was it not enclosed, with other lands, by a wire and post fence?

A. Well, now, it may be possible; because they were in the habit, those Indians, of renting their lands in bodies to people; and they would run a fence around and take in a whole mint of country. But I am certain it was not enclosed by itself as a quarter section.

Q. Prior to the time you allotted this land to the defendant, didn't Mrs. Smith apply to you for an allotment?

A. No. She applied first, if I remember right—I think I do—to be listed as an Indian. We were supplied with a list of all the Indians upon the reservation, that was taken by a commission sent there some years before for that purpose; and we were directed to allot lands to all persons whose names were on that list, if they were alive on the 14th day of April, 1891, and their children that might have been born before that time; and there was also a subsequent list made and sent to us, that had been filed with the department afterwards, containing some, perhaps ten or a dozen names, with instructions for us to inquire into their rights on the reservation. Among those names was that of Mrs. Smith and her children;

and we took testimony of the Indians in relation to the rights of these people, and sent that testimony to the Commissioner of Indian Affairs at Washington; and he directed us that they were not entitled to lands, and to make no allotment.

It is stipulated and agreed that the witness may sign the shorthand notes, as the signature to his testimony.

United States of America,
District of Oregon. } ss.

I, Joseph A. Sladen, clerk of the Circuit Court of the United States, for the District of Oregon, and special commissioner duly appointed by said Circuit Court of the United States, to take the foregoing testimony of J. B. Eddy, a witness on behalf of the above-named defendant, do certify as follows:

I. That pursuant to the foregoing order of the Honorable Charles B. Bellinger, District Judge for the District of Oregon, sitting as presiding Judge in the Circuit Court of the United States for said District of Oregon, the foregoing deposition of J. B. Eddy was taken before me on the part of the defendant in the above-entitled cause, at my office, in the city of Portland, and in said District of Oregon, on this 28th day of December, in the year of our Lord nineteen hundred.

II. That upon the taking of said deposition I was attended by Mr. R. J. Slater, of counsel for the complainant, and by Mr. John H. Hall, United States Attorney, on behalf of said defendant.

III. That the witness, before being examined, was by me duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, and that the testimony of said witness was by consent of both parties taken stenographically by M. A. Fleming, in my presence, and was by said M. A. Fleming duly extended.

IV. That by consent of both parties the said witness attached his signature to the stenographic report of his testimony, as taken down by said M. A. Fleming, in lieu of attaching said signature to said testimony when extended.

V. I further certify that I am not of counsel nor attorney for either of the parties hereto, nor in any way interested in the event of this cause.

VI. That I have retained said deposition in my possession until delivered by me, in a sealed package, in the United States mails, for transmission to Chas. H. Carter, special referee herein, at Pendleton, Oregon, and that said testimony, together with this certificate, were enclosed in a sealed package, directed to said Chas. H. Carter, at Pendleton, Oregon, duly stamped and registered in the postoffice at Portland, Oregon, for transmission to the above Chas. H. Carter.

In testimony whereof, I have hereunto set my hand and affixed the official seal of my office at said city of Portland, in said District of Oregon, this 28th day of December, A. D. 1900.

[Seal] JOSEPH A. SLADEN,
Clerk United States Circuit Court, for the District of Oregon, Special Commissioner.

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,

Plaintiff,

vs.

HY-YU-TSE-MIL-KIN,

Defendant.

No. 2,595.
Nov. 12, 1900.

Order Appointing J. A. Sladen Special Examiner.

Now, at this day, comes the plaintiff, by Mr. John H. Hall, United States Attorney, and moves the Court for an order appointing a special examiner to take the testimony in this cause at Portland, Oregon. On consideration whereof, it is ordered that J. A. Sladen, Clerk of the United States Circuit Court for the District of Oregon, be, and he is hereby, appointed a special examiner of this Court, to take and reduce to writing and transmit to the Court the testimony of J. B. Eddy, a witness on the part of the defendant in this cause, said testimony to be taken at such time and place in the city of Portland, in this State and District as said special examiner shall appoint, due notice thereof having been given to the parties hereto.

CHARLES B. BELLINGER,
Judge.

Filed November 12, 1900. J. A. Sladen, Clerk.

United States of America,
District of Oregon. } ss.

I, J. A. Sladen, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of order appointing J. A. Sladen special examiner in cause No. 2,595, Philomme Smith vs. Hy-yu-tse-mil-kin, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland in said District this November 17th, 1900.

[Seal] J. A. SLADEN,
Clerk.

Filed March 1, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 11th day of September, 1901, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.
No. 2,595.

Petition for Appeal.

The above-named appellant, Hy-yu-tse-mil-kin, conceiving himself aggrieved by the order and decree made and entered on the 10th day of July, 1901, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made and duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 11th, 1901.

JOHN H. HALL,
United States Attorney, Solicitor for Plaintiff in Error.

The foregoing claim or appeal is hereby allowed this —— day of September, 1901.

_____,
Judge.

Filed September 11, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 11th day of September, 1901, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.
No. 2,595.

Assignment of Errors.

The appellant in the above-entitled suit, in connection with his petition for an appeal, makes the following assignment of errors, which he avers occurred upon the trial of the cause:

1st. The Court erred in overruling defendant's demurrer to the bill of complaint.

2d. The Court erred in overruling the defendant's ex-

ception to the first finding of fact as made by the special examiner.

3d. The Court erred in overruling the defendant's exceptions to the ninth finding of fact of the special examiner.

4th. The Court erred in overruling defendant's exceptions to the 10th finding of fact as found by the special examiner.

5th. The Court erred in overruling defendant's exceptions to the twelfth finding of fact of the special examiner.

6th. The Court erred in overruling defendant's exceptions to the thirteenth finding of fact as found by the special examiner.

7th. The Court erred in overruling defendant's exception to the fifteenth finding of fact as found by the special examiner.

8th. The Court erred in decreeing that the report of C. H. Carter, Special Examiner in Chancery, be confirmed.

9th. The Court erred in decreeing that allotment heretofore made by J. E. Eddy and J. P. Bushee, as commissioners of the United States of America, of the following land situated upon the Umatilla Indian Reservation in Umatilla County, State of Oregon, to wit:

The southeast ¼ of section 20, township 3 north, range 34 east of the Willamette Meridian, to the defendant Hyyu-tse-mil-kin, which allotment was approved by the Honorable Secretary of the Interior April 12, 1893, be canceled.

10th. The Court erred in decreeing that "said land as

hereby allotted to the plaintiff, Philomme Smith, and plaintiff is entitled to the immediate possession thereof, and the defendant, Hy-yu-tse-mil-kin, his servants, and all persons holding under him as tenants, lessors, or otherwise, are perpetually restrained and enjoined from in any manner interfering with plaintiff's possession thereof."

11th. The Court erred in decreeing "that said complainant have and recover from the defendant her costs and disbursements incurred in this suit and taxed at $137.42."

12th. The Court erred in rendering any decree in said cause for the reason that the United States of America was a necessary and indispensable party defendant in said suit.

13th. The Court erred in refusing to enter a decree dismissing plaintiff's bill of complaint.

JOHN H. HALL,
United States Attorney for the District of Oregon.

Filed September 11, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Wednesday, the 11th day of September, 1901, the same being the 133d judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

HY-YU-TSE-MIL-KIN,
Appellant,
vs.
PHILOMME SMITH,
Appellee.
No. 2,595.

Order Allowing Appeal.

On this 11th day of September, 1901, came the appellant, Hy-yu-tse-mil-kin, by John H. Hall, United States Attorney for the District of Oregon, appearing in his behalf, and filed herein and presented to the Court his petition praying for the allowance of an appeal intended to be urged by him to the Court of Appeals for the Ninth Circuit; praying also that a transcript of the record, proceedings, and evidence and papers on which the judgment, order, and decree was herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the said Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does hereby allow the appeal prayed for.

CHARLES B. BELLINGER,
Judge.

Filed September 11, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Saturday, the 12th day of October, 1901, the same being the 6th judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

PHILOMME SMITH,
Plaintiff,
vs.
HY-YU-TSE-MIL-KIN,
Defendant.

No. 2,595.
Oct. 12, 1901.

Order Extending Time to File Transcript.

Now, at this day, for good cause shown, it is ordered that the time within which the defendant is required to file the transcript of record in this cause, in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended thirty days.

WM. B. GILBERT,
Circuit Judge.

Filed October 12, 1901. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

Clerk's Certificate to Transcript.

United States of America,
District of Oregon. } ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, in obedience to the within order allowing appeal, do hereby certify that the foregoing pages, numbered from 2 to 152, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause of Philomme Smith, plaintiff, vs. Hy-yu-tse-mil-kin, defendant, as the same appears of record and on file in my office and custody.

And I further certify that the cost of the said record is seventy-eight 80-100 dollars, and that the same has been charged in my account in said cause with the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 23d day of October, A. D. 1901.

[Seal] J. A. SLADEN,
Clerk United States Circuit Court for the District of Oregon.

[Endorsed]: No. 766. In the United States Circuit Court of Appeals for the Ninth Circuit. Hy-yu-tse-mil-kin, Appellant, vs. Philomme Smith, Appellee. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Oregon.

Filed October 26, 1901.

F. D. MONCKTON,
Clerk.

153½ At a stated term, to wit: the October term, A. D. 1901, of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Friday, the —— day of February, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Thomas P. Hawley, district judge; Honorable John J. De Haven, district judge.

HY-YU-TSE-MIL-KIN, APPELLANT,
v.
PHILOMME SMITH, APPELLEE. } No. 766.

Order of submission in U. S. circuit court of appeals.

Ordered, appeal argued by John H. Hall, esquire, United States attorney, counsel for the appellant, and R. J. Slater, esquire, counsel for the appellee, and submitted to the court for consideration and decision.

154 In the United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

Opinion.

Appeal from the circuit court of the United States for the district of Oregon.

John H. Hall, U. S. attorney, for appellant.
R. S. Slater and J. T. Hinkle, for appellee.

Before Gilbert, circuit judge, and Hawley and De Haven, district judges.

DE HAVEN, District Judge: This a suit in equity. The complainant is a full-blooded Indian woman, and a member of the Walla Walla band of Indians residing in the State of Oregon. The prayer of the bill is that an allotment of a certain quarter section of land, part of the Umatilla Indian Reservation, made to the defendant, be canceled, and for a decree that the complainant was and is entitled to have said land allotted to her under the act of Congress of March 3, 1885 (23 Stats., 340), providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in the State of Oregon. The decree of the circuit court was in favor of the complainant, and from this decree the defendant has appealed.

155 1. The appellant contends that the circuit court was without jurisdiction of the cause; that under section 6 of the act of Congress of March 3, 1885, the act above referred to, the action of the Secretary of the Interior in making the allotment of the land in controversy was final and cannot be made the subject of review in the courts. We are of the opinion, however, that the action was properly brought under the act of August 15, 1894 (28 Stats., 305), which provides:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper circuit court of the United States. And said courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him;" * * * This language is certainly broad enough to confer upon the circuit court jurisdiction to hear and determine the complaint of any person who is "in whole or in part of Indian blood," who claims "to have been unlawfully denied or excluded from any allotment or parcel of land" to which such person
156 claims "to be lawfully entitled by virtue of any act of Congress," and such is the nature of the bill filed by the complainant in this action.

2. The United States is not a necessary party to the suit. The matter in dispute here is between individuals, and involves simply a question of private right. We cannot see any necessity for making the United States a party to such an action in the absence of a statute requiring that it shall be done. In answer to the suggestion that the United States is interested in the question to whom the land in controversy shall be allotted, and unless made a party to the action will not be bound by the decree, it is sufficient to say that the United States has by the statute from which the above *question* is made, provided that a controversy of this character may be determined by an appropriate action in the circuit court, and that the decree therein shall have the same effect as an allotment allowed and approved by the Secretary of the Interior. An allotment made by or under the direction of the Secretary of the Interior entitles the allottee to a patent for the land allotted to him. (Sec. 1, act of March 3, 1885, 23 Stats., 340.) The provision in the statute that the decree of the court in an action like this shall have the same effect as an allotment made by the Secretary of the Interior entitles the successful party to a patent for the land allotted to him by the decree, and is in effect a consent upon the part of the United States to be bound by such decree and to issue its patent in accordance therewith.

3. We now proceed to inquire whether the decree of the circuit court is right upon the merits. The complainant is an Indian woman of full blood, a member of the Walla Walla tribe of Indians. In the year 1887, she, with the consent of the chiefs of the Walla Walla and Cayuse Indians, selected the land in controversy with the intention of having the same
157 allotted to her under the act of March 3, 1885 (23 Stats., 340), and she and her husband improved it by the erection thereon of a granary and two barns, and also enclosed it together with other lands selected

by her for her family. The total value of these improvements when made was about $700. The land was allot'ed to defendant in the year 1891. He did not have possession thereof at the time, or any improvements thereon. When the allotment was made the complainant was in possession of the land in controversy, although she and her family were actually residing upon other land with which it was enclosed. Prior to its allotment to defendant the complainant requested the commissioners, appointed for the purpose of making allotments of land on the Umatil'a Reservation, to allot the same to her, but they refused so to do because her name was not upon the census list of persons entitled to an allotment, and this action was approved by the Department of the Interior. It also appears that the census list was completed on June 7, 1887, and complainant was at that time living outside of the reservation upon lands which members of her tribe had been accustomed to occupy for hunting and fishing, and she did not take up her actual residence upon the reservation until shortly after the census was taken. At the time of receiving the allotment of the land in controversy the defendant had notice of all these matters. The complainant continued in possession of said land until the fall of 1896, when she removed therefrom in obedience to orders given her by the Indian agent in charge of the Umatilla Indian Reservation. In April, 1897, the Secretary of the Interior decided that complainant was entitled to an allotment of land on the Umatilla Indian Reservation, and in pursuance of that decision certain lands were allotted to her, and she accepted the same after being informed by the Indian agent that in his opinion such acceptance would not prej-
158 udice her right to the land in controversy. Since that time she has leased a portion of the land so allotted to her and received a stipulated rent therefor. Upon these facts we entertain no doubt of the justice of the decree of the circuit court. Under the act of Congress of March 7, 1885 (23 Stats., 340), it is provided that: "All allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon selections made by the heads of the family, and allotments to persons over eighteen years of age not classed as heads of families shall be made upon the selection of such persons." Section 6 of the act further provided that the Secretary of the Interior should "have power to determine all disputes and questions arising between Indians respecting their allotments." The State conferred upon the Indians the right of selecting the land which they wished to have allotted to them, and if there was only one claimant to a tract such claimant was entitled to receive an allotment thereof. If, however, more than one person made selection of the same tract, we think it was the intention of Congress that the allotment should be made with reference to priority of selection, residence, and improvements. This is the principle upon which the Government has always proceeded in the disposal of its public lands. Shepley v. Cowan, 91 U. S., 330. And although the statute does not expressly so declare, we have no doubt that it must be so interpreted as to make it the duty of the Secretary of the Interior, in determining disputes and questions arising between Indians respecting their allotments, to proceed upon this principle. The complainant was therefore, by reason of her selection of the same and prior possession and improvements thereon, equitably entitled to have the land in controversy

allotted to her, and the only reason why her right was not recognized
159 by the Secretary of the Interior was because she was not residing upon the reservation when the commission appointed for that purpose made up the list of those entitled to take lands in severalty. This was an erroneous view of the law. Under the treaty of June 9, 1855, made with the Walla Walla, Cayuse, and Umatilla Indian tribes (12 Stats., 945), the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, and to fish in the streams bordering on the reservation in which they had been accustomed to fish, was reserved to the Indians, and the claimant did not forfeit her right to an allotment by living with her family upon lands which her tribe had been accustomed to occupy. She was upon the reservation and in possession of the land in controversy, and had selected the same before it was allotted to defendant, and more was not required of her in order to give her an equitable right thereto. In denying her right to the allotment claimed by her the Secretary of the Interior committed an error of law which can be corrected by a court of equity, in accordance with the rule declared in Johnson v. Townsley, 13 Wall., 78; Moore v. Robbins, 96 U. S., 530; Shepley v. Cowan, 91 U. S., 340. Nor is the complainant estopped from maintaining this action by the subsequent action of the Government in allotting other lands to her. She accepted the allotment made to her upon the assurance of the Indian agent in charge of the reservation that her claim to the land in controversy would not be prejudiced thereby. No patent has been issued for the land so allotted to her and no further action on her part is necessary in order to authorize the Government to cancel such allotment. Certainly the defendant has been in no wise injured by this subsequent action of the complainant. If she had accepted the land allotted to her in satisfaction of her claim under the treaty and act of Congress, a dif-
160 ferent question would be presented. The decree of the circuit court is affirmed.

(Endorsed:) Opinion. Filed Oct. 6th, 1902. F. D. Monckton, clerk.

161 United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
v.
PHILOMME SMITH, APPELLEE. } No. 766. Decree.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered, Oct. 6, 1902. F. D. Monckton, clerk.

162 In the United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

Petition for appeal.

The above-named defendant, Hy-yu-tse-mil-kin, conceiving himself aggrieved by the order and decree made and entered on the 6th day of October, 1902, in the above-entitled cause, doth hereby appeal from said order and decree to the Supreme Court of the United States, for the reason specified in the assignment of errors which is filed herein, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made and duly authenticated may be sent to the Supreme Court of the United States.

JOHN H. HALL,
U. S. Attorney and Attorney for Appellant by direction of the Attorney-General of the United States.

And now, to wit, upon this 5 day of December, 1902, it is ordered that above appeal be allowed as prayed for.

WM. B. GILBERT,
Presiding Judges of Court of Appeal.

(Endorsed:) Petition for appeal. Order allowing appeal. Filed December 8, 1902. F. D. Monckton, clerk.

163 In the United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

Assignment of errors.

The appellant in the above-entitled suit, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon the trial of the cause in the above-entitled court:

1st. The court erred in holding and decreeing that the complainant is a full-blooded Indian woman, and a member of the Walla Walla band of Indians; such finding is not supported by the evidence given in said cause.

2nd. The court erred in holding and decreeing that the circuit court of the United States for the district of Oregon had jurisdiction over the subject-matter of said suit, and the right and authority to make reallotments of lands to Indians.

3rd. The court erred in holding that the United States is not a necessary party to the suit.

4th. The court erred in holding that the complainant was entitled to allotment of land upon the Umatilla Indian Reservation.

5th. The court erred in finding that on June 7th, 1887, complainant

was living upon lands which members of her tribe had been accustomed to occupying for hunting and fishing, and that said finding is not supported by the evidence adduced at the trial of the cause.

164 6th. The court erred in holding that priority of selection gives priority of right to allotment of lands to Indians upon Indian reservations, and that it is the duty of the Secretary of the Interior in determining disputes and questions arising between Indians respecting their allotments to proceed upon this principle.

7th. The court erred in holding that in denying complainant's right to allotment claimed by her, the Secretary of the Interior committed an error which can be corrected by a court of equity.

8th. The court erred in affirming the decree in this cause to the circuit court of the United States for the district of Oregon.

9th. The court erred in refusing to reverse the decree of the circuit court of the United States for the district of Oregon in said cause.

JOHN H. HALL,
U. S. Attorney for the District of Oregon.

(Endorsed:) Assignment of errors. Filed Dec. 8, 1902. F. D. Monckton, clerk.

165 United States circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
v.
PHILOMME SMITH, APPELLEE. } No. 766.

Certificate of clerk circuit court of appeals to transcript on appeal.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and sixty-four (164) pages, numbered from one (1) to one hundred and sixty-four (164), inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same, together, constitute the transcript of record herein on appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of January, A. D. 1903.

[SEAL.] F. D. MONCKTON, *Clerk.*

166 In the circuit court of appeals for the ninth circuit.

HY-YU-TSE-MIL-KIN, APPELLANT,
vs.
PHILOMME SMITH, APPELLEE. } No. 766.

UNITED STATES OF AMERICA,
District of Oregon, ss.

To Philomme Smith, appellee, and to R. J. Slater, her attorney:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, on

Monday the 2nd day of March, 1903, pursuant to an appeal filed in the clerk's office of the circuit court of appeals for the ninth circuit wherein Hy-yu-tse-mil-kin is appellant and Philomme Smith is respondent, to show cause, if any there be, why decree in said suit mentioned should not be corrected and reversed, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melvill W. Fuller, Chief Justice of the U. S., this 22nd day of January, in the year of our Lord one thousand nine hundred and three.

WILLIAM B. GILBERT,
Circuit Judge.

Dated at Portland, Oregon, this 22nd day of January, 1903.

167 Due and legal service of the foregoing citation on appeal is hereby accepted at Portland, Oregon, this 22d day of January, 1903.

R. J. SLATER,
Attorney for Appellee.

168 (Indorsed:) No. 766. In the circuit court of appeals for the ninth circuit. Hy-yu-tse-mil-kin, appellant, vs. Philomme Smith, appellee. Citation on appeal. Filed January 27, 1903. F. D. Monckton, clerk.

(Indorsement on cover:) File No. 18824. U. S. C. C. of appeals, 9th circuit. Term No. 596. Hy-yu-tse-mil-kin, appellant, vs. Philomme Smith. Filed February 5th, 1903.

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